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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-827

HUGHES TOOL COMPANY

and

RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Miscellaneous Authorities

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The petition herein seeks review of a decision by the United States Court of Appeals for the Second Circuit entered September 1, 1971 [108a *et seq.**] on which rehearing was denied on September 28, 1971 [163a-164a] and which is reported at 449 F.2d 51. The decision of the court of appeals modified as to the rate of interest applicable and otherwise affirmed the opinions and judgment of the United States District Court for the Southern District of New York reported at 308 F. Supp. 679 [50a *et seq.*] and 312 F. Supp. 478 [81a *et seq.*]. These decisions of the district court and of the court of appeals confirmed in its entirety

* Citations with the suffix "a" are to pages of the appendix to the petition.

the Report and Award of the Special Master in this case, Hon. Herbert Brownell, filed September 21, 1968 (the "Brownell Report").

By their petition, Hughes Tool Company ("Toolco") and Raymond M. Holliday (collectively, "defendants") are also seeking reconsideration of matters previously decided by the United States Court of Appeals for the Second Circuit in a decision entered on June 2, 1964 and reported at 332 F. 2d 602 [19a *et seq.*]. Writs of certiorari with respect to this earlier decision were granted on November 16, 1964 and, after full briefing and argument, were dismissed on March 8, 1965 as having been improvidently granted, as had been suggested during oral argument by counsel for TWA. 379 U. S. 92 [44a], 380 U. S. 248, 249 [45a, 46a].

ORDERS AND OPINIONS BELOW

The "Opinions Below" listed in defendants' petition at pp. 1-3, and the separately bound appendix accompanying defendants' petition, omit (a) the opinions and orders of the district court in the course of supervising pretrial discovery, which the first two of defendants' "Questions Presented" ask this Court to review, (b) the opinion and order of the district court dated January 4, 1966, refusing to make the finding of fact on which the fifth of defendants' "Questions Presented" is logically dependent, and (c) the Brownell Report, which sets forth the Special Master's findings that plaintiff Trans World Airlines, Inc. ("TWA") had established that it was damaged in the amount of $45,870,478.65 by defendants' conduct in violation of the antitrust laws, as alleged in the complaint.

The Brownell Report, with its original pagination, has been filed herein and in No. 71-830 as a separately bound

Appendix to TWA's Conditional Cross-Petition for a Writ of Certiorari and Supplemental Appendix to Accompany Brief in Opposition. Certain of the relevant pretrial orders and opinions of the district court, not otherwise available to this Court, are also reprinted as an annex at the end of this brief.*

QUESTIONS PRESENTED

The seven "Questions Presented" listed in the petition are dealt with, in the same order, in the Argument (p. 25 *et seq., infra*). That Argument and the Counter-Statement of the Case (p. 4 *et seq.*) demonstrate that none of these questions is actually presented on the record in this case.

A threshold question is presented, however, as to the extent to which principal issues defendants seek to reargue are judicially foreclosed. The propriety of the very same discovery orders, the claimed right of defendants to make a "business decision" not to obey them, and the correctness of the district court's conclusion that this refusal of discovery compelled the entry of an order against defendants under the default provisions of Fed. R. Civ. P. 37—these precise issues were adjudicated in the court of appeals' final (not interlocutory) judgment in 1964. This was the judgment which affirmed the dismissal with prejudice of Toolco's counterclaims against TWA and others, never alluded to in the petition, and a writ of certiorari with respect to it (No. 501) was dismissed by this Court as

* Citations with the suffix "t" are to the annex to this brief; citations with the suffix "a" are to the appendix to defendants' petition; citations to "Brownell Report" are to TWA's appendix to conditional cross-petition and supplemental appendix to this brief in opposition; citations to "2d Cir. App. A- " are to the Joint Appendix in the court of appeals, a certified copy of which has been furnished to this Court by defendants; citations to "AX- " are to the Joint Appendix of Exhibits in the court of appeals, a certified copy of which has been furnished to this Court by TWA; and citations to "Doc. " are to documents in the record before the court of appeals not otherwise reproduced.

having been improvidently granted. 380 U. S. 249 [46a]. In its 1971 decision the court of appeals held that its prior decision was not binding on the present appeal, and therefore found it necessary to re-examine these questions and the record of pretrial proceedings, reaching the same conclusions as the 1964 panel. TWA suggests, however, that all of the elements calling for application of established doctrines of judicial finality are here met and that this alone is a sufficient reason for not granting the writ with respect to issues adjudicated in dismissing Toolco's counterclaims. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353 (1876); *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 100-01 (1954); *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 954-55 (2d Cir.), *cert. denied*, 377 U. S. 934 (1964); *cf. Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 328-29 (1971).

COUNTER-STATEMENT OF THE CASE

This lawsuit was commenced on June 30, 1961. Plaintiff TWA was a corporation with more than 13,000 public stockholders (now 38,000), the stock of which has at all relevant times been traded on the New York Stock Exchange. It was and is the only United States-flag airline authorized to conduct regularly scheduled operations on both transatlantic and transcontinental routes. The named defendants were Howard R. Hughes, Toolco, a diversified corporation wholly owned by Hughes, and Raymond M. Holliday, an officer and director of Toolco and a director of TWA.

Until the end of 1960, six months before the complaint was filed, TWA had been for many years dominated by Hughes and Toolco. At that time, TWA had available for service only 27 jet aircraft, of which 17 were on day-to-day leases from Toolco [AX-101].* On December 30, 1960, at

* Hughes, indeed, appears to have been personally negotiating at around this time for the sale to American Airlines of 15 of the 27 jets operated by TWA [2d Cir. App. A-203].

the insistence of TWA's senior creditors, Toolco's holdings of TWA stock (amounting at the time to 78% of the outstanding shares) were placed in a voting trust. In an opinion and order dealing with this and certain related transactions, the Civil Aeronautics Board (the "CAB") stated:

> "We have not been told officially of the reasons which motivated the decision of the insurance companies and banks to seek this protection. However, we have not been unaware of TWA's problems.
>
> "For example, it is a matter of public record that TWA's major competitors arranged the financing of their jet fleets at a significantly earlier date than did TWA. The impact of this fact may be indeed far-reaching.
>
> • • • • •
>
> "Moreover, it is probable that the delay in arranging financing has also prevented TWA from securing delivery of a substantially large portion of the jet fleet which was ordered on its behalf. • • • It appears that the failure to receive this equipment as planned may have played a substantial part in TWA's recent inability to maintain its traffic position relative to its principal competitors. • • • It appears to be significant that TWA's major competitors have already taken delivery of much larger jet fleets than TWA is operating and have firm orders for delivery of more.
>
> "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest." (32 C.A.B. 1363, 1364-65, Order No. E-16195 (Dec. 29, 1960))

Of the three voting trustees, two were prominent independent businessmen appointed by the creditors: Irving S. Olds, former Chairman of the Board of Directors of United States Steel Corporation, and Ernest R. Breech, former Chairman of the Board of Directors of Ford Motor Company. The third was the defendant Holliday, representing

Toolco and Hughes; Holliday, however, opposed all of the steps thereafter taken by the trustees.

At a special stockholders' meeting early in 1961 the trustees caused a sufficient number of directors to be replaced to establish a new, independent majority of the board, which elected Charles C. Tillinghast, Jr. (formerly Vice President—International Operations of The Bendix Corporation) as president.* The new board also retained independent counsel with no prior connections with either TWA or Toolco "* * * to determine whether [TWA] has a cause of action to recover damages from any party or parties in connection with the procurement of aircraft, ground equipment, training aids, financing thereof, or any other matter" (Minutes of TWA's Board of Directors Meeting, March 20, 1961, p. 12). On the recommendation of such counsel, made after an investigation of such sources as were available to TWA, this lawsuit was brought against Hughes, Toolco and Holliday.

The complaint

The complaint charged defendants with a combination and conspiracy to restrain and monopolize and an attempt to monopolize a substantial segment of trade, beginning in 1939, the objects of which were to monopolize the supply of aircraft to TWA and to use TWA as a captive market in making Toolco a dominant source of supply of aircraft to air carriers generally—all in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 2 of the Sherman Act, 15 U.S.C. § 2 [complaint, pars. 9, 10, 11].**

* In addition to Tillinghast and Breech, who became chairman of the board, the new directors were Clifford F. Hood, former President of United States Steel Corporation; Barry T. Leithead, President of Cluett, Peabody & Co. Inc.; Houston M. McBain, former Chairman of Marshall Field & Co.; and John A. McCone, former Chairman of the Atomic Energy Commission.

** TWA's complaint is at 2d Cir. App. A-1 *et seq.*

The complaint charged that, for the purpose of establishing complete domination and control over TWA's acquisition of aircraft, Toolco conditioned the supply of aircraft to TWA upon TWA's confining itself to such financing as Toolco provided for it, and conditioned the provision of financing to TWA upon TWA's accepting such aircraft on such terms as Toolco dictated [complaint, pars. 9, 10, 23, 24]. It charged that Toolco imposed upon TWA a boycott of manufacturers that could have supplied aircraft to TWA directly [complaint, pars. 9, 10, 17, 20] and that, during the years 1959 and 1960, pursuant to the conspiracy, day-to-day leases of aircraft by Toolco to TWA were conditioned on an understanding that TWA would not acquire aircraft except from Toolco [complaint, pars. 9, 20].*

It charged that there were other conspirators besides defendants, one being Atlas Corporation, in which Hughes was individually an 11% stockholder, and which in turn controlled Northeast Airlines [complaint, par. 6]. Atlas was alleged to have joined the conspiracy at an unknown date prior to May 1960. An attempt, participated in by Atlas, to impose upon TWA a merger with Northeast on terms disadvantageous to TWA was alleged, as was a transfer to Northeast of six Convair 880 jet aircraft ordered by Toolco, three of which had previously been contractually assigned to TWA [complaint, pars. 21, 22].**

The mechanics of the attempt during 1955 and 1956 to use the TWA captive market for aircraft to secure a dominant position in the supply of jet aircraft were

* The leasing of jets on the illegal condition was alleged, in addition, to violate Section 3 of the Clayton Act, 15 U.S.C. § 14. A violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, was also alleged, and divestiture and other equitable relief were asked, in addition to damages. These claims for equitable relief were mooted, however, on Toolco's voluntary sale of all of its TWA stock in 1966, for $546 million in cash, at a profit to Toolco of over $450 million.

** Subsequent to the filing of the complaint, Toolco acquired control of Northeast from Atlas, and leased four other Convair 880s to Northeast.

alleged in considerable detail [complaint, pars. 14-17]. Defendants engaged in a joint venture with the Convair Division of General Dynamics Corporation to develop a jet aircraft which TWA would be required to buy as an initial captive customer [complaint, par. 14]. To preserve this captive market during this period, when TWA's principal competitors were placing direct orders with Boeing and Douglas, Toolco prevented TWA from arranging either for direct acquisition of jet aircraft or for the financing of such aircraft. When the initial joint venture effort with Convair failed, defendants were alleged to have thereafter planned the direct manufacture by Toolco of jet aircraft—also to be marketed to airlines generally, with the TWA market as a captive marketing base [complaint, pars. 15, 16, 17, 26]. In 1956, jet aircraft were ordered by Toolco from other manufacturers (Boeing and Convair), but it was alleged that Toolco repeatedly refused to assign rights to such aircraft to TWA [complaint, par. 18].

It was alleged that defendants' attempts to prevent TWA from acquiring aircraft directly from manufacturers instead of through defendants had continued subsequent to 1960, and examples were given [complaint, pars. 36-48].

The injuries caused TWA by this course of conduct were spelled out [complaint, pars. 50-53]. They consisted principally in its having been prevented from obtaining jet aircraft and deprived of opportunity for adequate use of jet aircraft from 1958 on, with a resultant loss of profits [complaint, par. 52(a)], and in its having been prevented from obtaining financing in 1955 and 1956, when interest rates were low and when its competitors obtained such financing. Among the specific examples of injuries alleged, in addition to such matters referred to above as the assignment of Convair 880s to Northeast and the day-to-day leases of jets in 1959 and 1960 on unlawful conditions, was the diversion by defendants

of six long-range Boeing jet aircraft to Pan American World Airways, TWA's principal transatlantic competitor [complaint, par 18]. Other injuries were alleged to include TWA's inability to dispose of its used piston aircraft (because of the insufficiency of its jet equipment) until the market for such aircraft had dropped considerably, impairment of TWA's ability to secure financing, loss of goodwill, and general disruption of TWA's management and business [complaint, pars. 52, 53]. Damages were estimated as in excess of $35,000,000 [complaint, par. 54].

Thus, TWA's complaint charged that its late financing, the delay in delivery and inadequacy of its jet fleet, and its loss of competitive position, to which the CAB had referred in Order No. E-16195 (*supra,* p. 5), and the disastrous losses which had resulted, *were caused by defendants' wrongful conduct and were the result of a conspiracy and attempt to monopolize in violation of the antitrust laws.*

The answers and counterclaims: issues presented

It proved impossible for TWA to serve process on Hughes. Toolco's answer (adopted in substance by Holliday) put in issue substantially all of the averments of TWA's complaint, and also included extensive counterclaims against TWA and nine additional defendants.* The counterclaims charged that TWA and its new management, a number of financial institutions and their officers (referred to collectively throughout the litigation and here as "additional defendants") had been engaged in a conspiracy in violation of the antitrust laws to force Toolco to give up control of TWA and to monopolize aircraft financing in the hands of the financial institutions.

*Toolco's Answer and Counterclaims is at 2d Cir. App. A-41 *et seq.* and Holliday's Answer is at 2d Cir. App. A-99 *et seq.*

TWA's losses (stated to have exceeded $45 million [Toolco answer, par. 99], the amount to which TWA subsequently amended its own *ad damnum* clause) were charged to have been the result of this conspiracy, and Toolco was stated to have suffered damages amounting to $77 million.*

By its answer, Toolco identified the critical issues as to which evidence would be needed, in addition to evidence of the extent of TWA's losses. For example, Toolco denied that Hughes had directed, controlled and dominated it [Toolco answer, par. 4], and denied that it had engaged in the combination, conspiracy and attempt charged or that any of the specific acts which it had admittedly done were done pursuant to such a combination, conspiracy and attempt, or pursuant to an intent on the part of the defendants to utilize TWA as a captive market for aircraft and to become a dominant source of supply of aircraft to air carriers [Toolco answer, par. 1]. It denied that it had engaged in a joint venture with Convair to develop a jet aircraft to be supplied by defendants to air carriers including TWA, for which aircraft TWA would serve as a captive market [Toolco answer, par. 10]. It denied that defendants had caused and directed TWA to forego making any arrangements for the acquisition of jet aircraft [Toolco answer, par. 13]. It denied that it had refused to assign rights to acquire jet aircraft to TWA, denied that the transfer of long-range Boeing jets to Pan American was caused by defendants, and affirmatively alleged that this transfer had been recommended and approved by TWA's management [Toolco answer, par. 14]. It denied that it

* Defendants' omission of any mention of these counterclaims is not an oversight. There has been an adjudication against Toolco which is final and binding on every issue involved. Factually, that final judgment constitutes a rejection of defendants' version of what really happened. Defendants are very anxious to avoid any consideration of the implications of the dismissal with prejudice, factual as well as legal.

had prevented TWA from making test and acceptance flights of specific Convair 880 aircraft [Toolco answer, par. 15]. It denied that its day-to-day leases of aircraft to TWA were conditioned on the understanding that TWA would not acquire aircraft from any other potential supplier [Toolco answer, par. 16]. It denied that it did not allow TWA to make its own arrangements for financing aircraft [Toolco answer, par. 1].

This partial list sufficiently indicates the scope of the issues on the merits of TWA's claims to which discovery—by TWA as well as by defendants—was necessarily directed. Central to the establishment by TWA of its right to recover under the antitrust laws were the issues as to defendants' intent and purposes in establishing control over TWA, its financing and its aircraft acquisitions, and whether—and why—Toolco prevented TWA from ordering its own aircraft and arranging its own financing, and diverted jet aircraft needed by TWA to TWA's competitors. The nature and purpose of the arrangements which defendants made with Convair, and the nature and purpose of defendants' equipment transactions and negotiations with airlines other than TWA, were identified by the pleadings as issues of critical importance. Toolco's denial of control by Hughes (accompanied by a denial of each allegation of the complaint connecting Hughes with the specific actions and events charged) also placed in issue the details of Hughes's operating relationships with both Toolco and TWA.

Discovery

Initial priority of discovery went to defendants, and TWA was required to begin production of documents in August 1961 [1t]. On August 31, 1961 the case was assigned by the Chief Judge to Judge Charles M. Metzner for all purposes, pursuant to Rule 2 of the General Rules for the United States District Court for the Southern District of

New York [2d Cir. App. A-33]. Pursuant to a schedule fixed by Judge Metzner [6t-7t], Toolco began its deposition of Tillinghast, TWA's president, on January 5, 1962 [Doc. 53].

Although Tillinghast had come from outside TWA, had been president for less than three months when the complaint was filed, and had no personal knowledge of events before he joined TWA, defendants were still taking his deposition in July 1962, with no signs of bringing it to a conclusion. On July 12, 1962 Judge Metzner ordered the deposition to be completed by July 25, 1962 [9t]. The deposition transcript was 6,729 pages long at the conclusion of Tillinghast's testimony [Doc. 222]. Thereafter, a deposition of Robert W. Rummel, TWA's principal procurement officer, was taken and concluded on October 16, 1962 [Doc. 227, p. 1928]. Two other depositions were commenced by defendants but still had not been completed on February 8, 1963, when defendants informed the district court and the parties that they would refuse to participate in any further discovery proceedings.

Before February 8, 1963, TWA and the additional defendants were prevented from engaging in deposition discovery, but Toolco, the additional defendants and some non-parties were required to produce documents in response to various demands. It became apparent that critical documents were to be found in three areas: (a) such records of Hughes's conversations and directives as had been preserved, partly in Toolco's telephone and message center at 7000 Romaine Street, Los Angeles, and partly in the form of notes preserved by third parties of telephone conversations with Hughes;* (b) documents involving the lawyers through whom many of Hughes's and Toolco's busi-

* Apparently as a matter of practice, Hughes never corresponded. Communication with him was solely by telephone, and the Los Angeles message center operated 24 hours a day, 365 days a year, to facilitate this unique operating method.

ness negotiations had been conducted, as to which defendants claimed attorney-client privilege; and (c) documents which would reveal the financial aspects of defendants' dealings in aircraft, not only with TWA, but with others.

In the first area, the available records were fragmentary in the extreme; occasional verbatim messages were kept for later delivery, when the two parties could not be put in direct contact, but the message center record of any actual conversation was limited to such comments as "They talked" or "Omit. They talked" [AX-665-728 *passim: e.g.*, AX-669, AX-673, AX-691, AX-694]. Subjects of particular interest were from time to time summarized in "memoranda", and the raw telephone records destroyed. Unfortunately no memoranda were produced, defendants explaining that they, too, had been destroyed [Doc. 215, pp. 3412-13; Doc. 306, pp. 2-3; Doc. 307, pp. 5-7]. It was thus plain that oral discovery of Hughes was necessary to develop the relevant, material facts.

In the second area, defendants claimed attorney-client privilege. Special Master J. Lee Rankin, who had been appointed to supervise discovery proceedings [3t-4t], twice held and the district court twice agreed that the privilege—if any—had been waived, that the documents were material and relevant, and that they should be produced [11t-12t, 21t-22t]. Defendants disregarded these orders, and as of February 8, 1963 were in open and admitted defiance of still a third order to produce this material [2d Cir. App. 305-06].

In the third area, tax returns and audited financial statements of Toolco through 1960 were produced (with such extraordinary precautions as to secrecy that the documents are still sealed and appear nowhere in the printed record). No work papers or detailed audit reports were produced, and the extreme brevity of the returns and balance sheets and income statements made it impossible to determine with any precision the specific transactions reflected by any

particular entry. A motion was made for the production of work papers and other material which would clarify these and related matters, specifying 23 categories of documents in all, and including a demand for material subsequent to 1960 [2d Cir. App. A-133-36]. The documents were held relevant and material; Toolco advised the parties that at least nine cartons of such documents existed. Ordered to turn them over to TWA and the additional defendants, counsel for defendants, in open court, flatly refused [2d Cir. App. A-133-36, A-304-05].

TWA informed the court that its principal evidence on the critical issues of the litigation would come from Hughes. It exhibited documents which demonstrated that Hughes had been the prime mover in every matter described in the complaint [*e.g.*, Docs. 165, 166, 167]. The district court (which conducted in this period over 19 pre-trial hearings) found: "It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally" (32 F.R.D. at 606) [14a]. It further found: "It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case" (32 F.R.D. at 607) [17a].

Defendants' conduct during this period has been extensively reviewed, not only by the district court but by two panels of the Court of Appeals for the Second Circuit. Defendants' motives were transparent—to conduct their own discovery interminably while resisting at all cost any meaningful discovery by TWA and the additional defendants.* Chief Judge Lumbard summarized the unanimous view of the court of appeals in these words:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and

* It was, of course, TWA and not Toolco that was ultimately vulnerable to the financial burdens of interminable litigation. As pointed out below, Toolco was worth "several" hundreds of millions of dollars by its own assertion, while TWA was in desperate financial straits during the first two years after it was freed from Hughes's control. The repeated assertions in defendants' petition that TWA's lawsuit constituted financial oppression of Toolco (*see* Petition, pp. 14, 16, 17, 18) are utter nonsense.

> Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute." (332 F.2d at 615) [40a-41a]

Judge Kaufman, also speaking for a unanimous court, stated:

> "Clearly the court was entirely correct in concluding that the litigation would only continue its desultory course without the appearance on stage at the earliest possible moment of the hitherto unseen Prince of the drama." (449 F.2d at 61) [122a]

The default; amendment of *ad damnum* clause

The default was eventually established in open court at a hearing held at the close of business on Friday, February 8, 1963, the last business day before the deposition of Hughes was to begin in Los Angeles at 10 a.m. on Monday, February 11.* Demands by Toolco that extensive interrogatories be answered by TWA and that issues be

* The deposition had been originally scheduled for April 23, 1962, on the assumption that Toolco would have concluded its depositions by that time [7t]. TWA's attempts to serve a witness subpoena on Hughes having been unsuccessful, Toolco was twice ordered in July to answer interrogatories as to Hughes's whereabouts [8t; Doc. 103]. In lieu thereof, Toolco arranged to accept service of a witness subpoena on Hughes's behalf, and it expressly vouched for the validity of this service [2d Cir. App. A-272]; elaborate precautions were taken by the court to assure that Hughes was personally advised of what had been done in his name and its potential consequences [15t-17t]. That subpoena provided for the deposition to commence on September 24, 1962. This was postponed by court order to October 29, 1962 to permit Toolco to carry its own discovery further [*ibid.*] and then further postponed to February 11, 1963, which date, however, was expressly stated to be subject to no further adjournments "in the absence of extraordinary circumstances" [19t].

limited in a so-called "Rule 16" conference prior to commencement of the Hughes deposition had been denied, the court providing that TWA would be permitted to examine Hughes before it was required to answer the interrogatories, and stating that, since Hughes's deposition would "facilitate an intelligent ruling upon Toolco's application pursuant to Rule 16", the denial of the application was without prejudice to a renewal after Hughes's examination had been completed [20t]. No suggestion was ever made that there was any medical or other obstacle to Hughes's appearing, and as the court of appeals pointed out, Judge Metzner had offered to have the deposition taken "in as much privacy and under any other conditions that might suit Hughes's aversion to public appearance" (449 F.2d at 62) [122a].

On February 8, 1963 Toolco served upon the Special Master, TWA and the additional defendants a document entitled "Notice of Position" stating that Toolco "hereby elects * * * to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial and trial proceedings * * *" [2d Cir. App. A-268-69]. At TWA's request the district court scheduled a further pretrial hearing at 5 p.m. that day to establish the meaning and implications of this communication.

At the outset of the February 8 hearing, TWA's counsel gave formal notice that TWA claimed and now expected to prove damages of at least $45 million before trebling, and that TWA intended to move to amend its complaint in that respect [2d Cir. App. A-271].

After this notice had been given, counsel for defendants formally stated that it was his clients' "business decision" that the deposition would not be held, and to proceed no further with any pretrial discovery, in defiance of all court

orders [2d Cir. App. A-280]*. The meaning and effect of this decision was explored at length, and it was made quite clear that defendants accepted that they would be liable in damages if the several grounds on which they were seeking review were determined against them. Counsel for Toolco stated:

> "• • • we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date • • • they may be deprived of further defending on the merits, other than on the question of damages." [2d Cir. App. A-276]

At a later point in the same hearing he explained:

> "My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." [2d Cir. App. A-297]

Since Hughes's deposition was to be taken pursuant to a valid witness subpoena, and Hughes had neither objected to it nor made any representation that he would be unavailable or would refuse to testify, TWA took the position that, regardless of Toolco's "business decision", TWA was entitled to proceed with this vital discovery [2d Cir. App. A-292-98]. However, at Toolco's express request and in reliance upon its stated willingness to respond in damages, Judge Metzner stayed TWA from proceeding and directed that the deposition not be taken [2d Cir. App. A-307].

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* It was at this February 8 hearing that counsel for defendants gave as a reason for the "business decision" the cost of proceeding with the Hughes deposition, of which so much is made in defendants' petition [2d Cir. App. A-280]. He estimated it at $5 million (explaining that the figure was supplied by his clients and declining to vouch for its accuracy)—a ridiculous estimate that TWA at the time called "obviously absurd" [2d Cir. App. A-293].

There followed inevitably the entry by the district court on May 3, 1963 of a final judgment dismissing Toolco's own counterclaims with prejudice and an interlocutory judgment in TWA's favor upon its complaint (32 F.R.D. at 607) [17a; 2d Cir. App. A-323]. No final judgment could be entered upon TWA's complaint until after an evidentiary hearing to establish the amount of its damages. It was ruled, however, that since Toolco would be represented at the damage hearing and in a position to contest TWA's damage proof, TWA was entitled to recover such actual damages as it could establish, and its motion to amend its complaint was accordingly granted (32 F.R.D. at 607-08) [17a].

The 1963-1965 appeals

Following entry of the default judgment on TWA's complaint and dismissal of Toolco's counterclaims with prejudice, defendants were granted immediate review of the decisions below. Toolco appealed as of right from the dismissal of its counterclaims (an order pursuant to Fed.R.Civ. P. 54(b) having been entered), and after appropriate certification by the district court, the court of appeals allowed defendants an interlocutory appeal, pursuant to 28 U.S.C. §1292(b), with respect to the complaint (32 F.R.D. at 608) [18a] (332 F. 2d at 605) [20a]. Both in the court of appeals and later in this Court these separate appeals were heard together. Thus, there were presented to both appellate courts at that time, on one or both appeals, not only the jurisdictional but also the procedural questions which the district court had passed upon in the course of the various pretrial hearings, including all aspects of the conduct of pretrial discovery.

The 1963-1965 appeals resulted in affirmance by the court of appeals of the district court's decisions on all matters presently relevant. Certiorari was granted as to both appeals, and there was full briefing and argument, including acceptance by this Court of a brief *amicus* filed on behalf of

the CAB, which supported the correctness of the decisions below insofar as they dealt with matters of primary jurisdiction and the asserted exemptive effect of the CAB's prior orders.

As his first point on oral argument, counsel for TWA urged that certiorari be dismissed because the decisions below were plainly correct (Transcript of Argument in No. 443, p. 18). On the next decision day both writs were dismissed as improvidently granted.

Defendants' petition attributes this dismissal to the fact that the appeal from the judgment in TWA's favor, No. 443, was interlocutory, not final (Petition, p. 10); but the appeal from the dismissal with prejudice of Toolco's counterclaims, No. 501, was from a final judgment, plainly binding unless reversed. This Court's order left standing in its entirety the court of appeals' affirmance of the district court's decision, as a final adjudication of every issue involved in the dismissal with prejudice of the counterclaims.*

The damage hearings

The damage hearings followed next, before Special Master Brownell. They extended over a period of 2½ years —3½ years if time spent in determining various preliminary matters relating to the scope of the default is

* An attempt by Toolco, initiated after the default, to reacquire control of TWA through acquisition of the power to replace the independent voting trustees was rejected by the court of appeals late in 1964, on an appeal from a CAB order disclaiming jurisdiction. The court of appeals held that no such reacquisition of control was permissible without a public hearing. A petition for certiorari filed by Toolco as intervenor, in which the CAB did not join, was denied by this Court. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board, (Hughes Tool Company, Intervenor)*, 339 F.2d 56 (2d Cir. 1964), *cert. denied*, 382 U. S. 842 (1965).

included.* The transcript of testimony taken at the damage hearings totalled almost 11,000 pages, substantially all of it cross-examination, since the direct testimony of witnesses was presented in written form. Over 60,000 pages of documents were admitted in the record as exhibits. The scope and thoroughness of these hearings and the intensity with which each issue was contested are reflected in the Brownell Report. Every point which defendants' petition attempts to make to this Court was raised in the damage hearing and is considered and rejected in the Report, except solely their arguments with respect to the conduct of the discovery proceedings and that the CAB had exempted their unlawful conduct from the antitrust laws (Sections A and D of the Petition), both of which had been expressly raised and rejected on the previous appeals.

Defendants' objections to the damage award were voluminous. In all, more than 1,300 pages of briefs and memoranda were submitted to the district court. Consideration of the objections and review of the record occupied the district court for over a year, after which the Brownell

* One of these preliminary matters was an express refusal by the district court to find that the allegations of paragraph 3 of TWA's complaint were untrue [32t-33t]. Such a finding was again requested of the Special Master at the close of the damage hearing, and was again expressly refused [Brownell Report, pp. 26, 28-33]. This factual determination, confirmed yet again by the district court in 1969 after a review of the entire record (308 F.Supp. at 686) [60a] and affirmed unanimously by the court of appeals (449 F.2d at 67-68) [133a-136a], is still disputed in defendants' present petition on the basis of entirely unsupported assertions of facts not found below. Defendants' contention, now four times rejected, heads the list of items in the footnote at pp. 11-12 of defendants' petition which are described as "facts, none of which had ever been in dispute" and which were, it is claimed, "confirmed in the course of the cross-examination of TWA's witnesses". That entire list, indeed, consists of restatements of factual contentions and related claims of innocent motivation which defendants attempted to prove at the damage hearing, which they asked the Special Master to find, and which he refused to find.

Report was confirmed by Judge Metzner in its entirety, each of the objections filed (those of TWA as well as those of defendants) being expressly overruled.

The appeal which followed was given correspondingly careful attention. The parties were permitted to file briefs without regard to the ordinary length limitations. Counting the various annexes bound in with the briefs, the appellate briefs totaled 719 pages, and the printed Joint Appendix and Joint Appendix of Exhibits consisted of 12 bound volumes. A full day was set aside for oral argument. The meticulous attention given by the court of appeals to all of defendants' arguments—including those which had been previously made, unsuccessfully, in the course of the 1963-1965 appeals—is fully apparent from Judge Kaufman's opinion. Except for a modification of the rate of interest on the judgment, the decisions below were unanimously affirmed in every respect.

Summary of Argument

While this lawsuit is unusual and perhaps unique, both with respect to the factual issues involved in the basic controversy and the unprecedented use by defendants of default as a tactic in a continuing litigation, there are no special and important reasons for further review by this Court. Such a lawsuit as this is not likely to recur, and as a defaulted case it lacks the factual record necessary for adequate consideration of the substantive antitrust questions tendered by defendants.

Nothing that has happened since this Court's dismissal of certiorari in 1965, after briefing and oral argument, has made the case more worthy of consideration by this Court. The questions of law involved in the post-1965 proceedings for the most part consist of long-established principles applicable to wilful defaults. These principles are seldom invoked because of the relative infrequency of such defaults by parties wishing to continue in active litigation. Defend-

ants' strategy of discover, default and defend on the damages has not been widely imitated.

Only two of the seven legal questions now tendered by defendants for decision by this Court were not presented in 1965* and none can be fairly described as of general significance. The decision below is not in conflict with the decision of another circuit on the same matter**; it is not a decision of an important question of federal law which requires settlement by this Court or which is in conflict with applicable decisions of this Court. Nor is the exercise of this Court's power of supervision called for by any departure by the courts below from the accepted and usual course of judicial proceedings.

Indeed, the action taken by the lower courts, once defendants had taken the highly unusual step of electing to disregard the district court's discovery orders and thus deprive TWA of access to critical evidence, was the minimum that was fair to a plaintiff so disadvantaged. TWA could not thereafter be required to prove the facts alleged in the complaint, as defendants obviously understood when they first announced and explained their "business decision", but the lower courts did require TWA to prove its damages in exhaustive detail. In the course of the damage hearing and subsequent judicial review—the only aspect of this proceeding taking place subsequent to this Court's 1965 dismissal of certiorari—defendants were accorded full opportunity for cross-examination, submission of rebuttal evidence and oral and written argument, and they exercised these rights abundantly.

The questions now advanced by defendants as a basis for review by this Court are merely artfully phrased efforts to extract from this controversy over defaults and damages

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* No. 7 and the last clause of No. 2.

** The conflict between circuits alleged at p. 25 of the petition is not a real one; confronted with the same facts there is no reason to believe the circuits would have ruled differently. See pp. 39-40, *infra*.

some legal issues of general significance. They simply are not there. All of the questions posed are based on assertions or assumptions of fact which are refuted by the record or which the courts below declined to find because of defendants' election not to submit their contentions to the scrutiny of discovery.

A. Defendants' first proposed question hinges on their factual assertion that the complaint and pretrial proceedings prior to the scheduled deposition of Hughes did not identify the allegedly illegal conduct "with reasonable specificity." The complaint here is in fact a very specific one, upheld as sufficient by the lower courts, and there is no merit to the charge of failure of specificity. The illegal transactions were clearly identified. Defendants had no constitutionally protected right to refuse to comply with lawful discovery orders in order to force TWA to establish its case on the merits without benefit of discovery. Their contrary argument is frivolous. (pp. 25-31, *infra*)

B. Defendants' second question relies on assertion of the fact, not found by the Special Master or either court below, that the circumstances of the default did "not permit a presumption that the defendant has no defense to the action." If any presumption is to be made with respect to the real reasons for the default, the normal presumption that defendants realized that they could be shown to have acted unlawfully cannot be excluded. Having deliberately chosen as a "business decision" to refuse to comply with lawful discovery orders with respect to evidence of vital importance on all contested issues, and with the express expectation that a default judgment might be entered, defendants were not denied due process by the entry of a default judgment which ruled that the well-pleaded, material and traversable allegations of the complaint were admitted. Any other result would constitute a serious deprivation of substantial justice and due process to the plaintiff TWA to which discovery was denied. (pp. 32-38, *infra*)

C. The implicit premise of the third question posed by defendants is that the defaulting defendant had no notice of the proposed amendment of the *ad damnum* clause at the time of its decision to default and had no opportunity thereafter to change its decision. In this case, that premise is plainly false. Defendants had notice of the proposed amendment at the time they elected to default and despite such notice stood by that election. Moreover, the default judgment was not entered until three months later, but defendants never offered to comply with the district court's discovery orders. (pp. 38-40, *infra*)

D. Defendants' fourth question, which probably did not survive the default in any case (see pp. 41-42, *infra*), is based on the unstated premise that there was no unlawful and undisclosed motive underlying the acts performed by defendants in the exercise of their control over TWA. The question of motivation would have been explored, if defendants had been willing to permit discovery, and the present record is therefore incomplete as to the critical facts needed to resolve the question now posed by defendants. The CAB's brief *amicus* filed when this case was here in 1965 confirms that the Board's past orders, approving solely defendants' acquisition of control over TWA, were not intended to and did not immunize them from liability in damages to TWA for conduct admitted by their default to be pursuant to a conspiracy to restrain and monopolize and in furtherance of their attempt to monopolize a substantial segment of trade. (pp. 41-46, *infra*)

E. Similarly, the fifth question raised by defendants embodies the assumptions that the parent corporation (here Toolco) is not a competitor of equipment suppliers and is not acting for unlawful purposes. These assumptions do not and could not rest on any factual finding below, and are at variance both with the allegations of TWA's complaint

and with evidence available to TWA concerning Toolco's dealings in aircraft. In any event defendants' failure to make discovery precluded building a record and making a finding on this issue. (pp. 47-48, *infra*)

F. Defendants' sixth question assumes that they "in no way restrained or monopolized a particular area of commerce." This assumption is flatly contrary to the basic allegations of the complaint admitted by the default. The Special Master and both courts below found that the evidence supported the inference that Toolco's extensive activities had important competitive impact in the relevant market and "combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts and monopolization alleged in the complaint" would have supported an antitrust judgment for TWA in a trial on the merits, had there been one. (pp. 49-51, *infra*)

G. Defendants' final question assumes that plaintiff's evidence of damage was not related to the alleged restraint or monopolization and that plaintiff did not show that without defendants' interference it could have financed the purchase of aircraft. These assumptions are obviously not justified on the record as made in the damage hearing, and the findings of the Special Master and the courts below that TWA in fact made a sufficient showing were clearly warranted. (pp. 51-56, *infra*)

ARGUMENT

A. Defendants were not denied due process of law by the district court's pretrial discovery orders. (Petition, Section A)

Defendants' constitutional argument depends upon the proposition that their right to due process of law was violated when the deposition of Hughes was ordered before the procedures of Fed. R. Civ. P. 16 had been used to

limit and narrow the issues, and before TWA answered interrogatories propounded by defendants. This argument is frivolous on its face.

Nothing can be plainer than that the discovery which TWA sought and which the district court held TWA was entitled to, was reasonably calculated to develop or discover the existence of relevant evidence—evidence relevant, for example, to a determination

> (i) that defendants had in fact engaged in the conspiracy to restrain and monopolize trade and the attempt to monopolize charged in the complaint (*cf.* Petition, Section B),
>
> (ii) that defendants' activities of which TWA complained were such that they had not been and indeed could not be exempted from operation of the antitrust laws by orders of the CAB (*cf.* Petition, Section D),
>
> (iii) that such activities did not constitute "normal and natural" conduct of a majority stockholder in relation to its subsidiary but instead represented steps in a larger scheme, one part of which was a deliberate attempt to establish and exploit a captive market for anticompetitive purposes (*cf.* Petition, Section E),
>
> (iv) that that scheme had been translated into action with others than TWA (*cf.* Petition, Section F), and
>
> (v) that all of the foregoing was the cause of TWA's admitted losses—losses which defendants themselves had alleged in their counterclaims to be in excess of $45 million (*cf.* Petition, Section G).

Defendants could not construct in their petition a challenge to the materiality, relevance and probable availability of such evidence. They are therefore reduced to claiming—as a constitutional right—that a private antitrust plaintiff

must first go through various preliminary tests as to the sufficiency of the evidence already available to it before being allowed the benefit of the discovery provided by the Federal Rules. Before TWA was permitted to take a single deposition, the petition urges, the district court was required by the Constitution to compel TWA to answer all defendants' interrogatories and to hold a conference under Rule 16 for the limitation and definition of the issues even though the district court did not believe the case was ripe for such action.

The petition makes no attempt to hide the fact that what defendants really wanted was summary judgment, prior to discovery by plaintiff. Summary judgment under such circumstances being forbidden by the decisions of this Court, *e.g.*, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), they sought, and now claim as a constitutional right, the same thing under a different name.

At p. 15 of the petition defendants say:

> "Petitioners' reaction to the complaint was that this case was a classic one for summary judgment because the key facts apparently relied upon gave rise to no antitrust claim, and petitioners were ready to stipulate them."

Yet nothing could be plainer than that they were never prepared to stipulate the basic, critical facts which the complaint alleges. Indeed, each of those facts was then, has been since, and is still contested—defendants are still asking for summary judgment in their favor based on their contrary assertions, without allowing TWA its rights of discovery.

It is revealing to examine the nature of the interest for the protection of which defendants are invoking this claimed constitutional right to freedom from discovery. The only interest now claimed is defendants' financial inter-

est in not being subjected to the expense of litigation. The deposition was "expected to take at least 'a good two or three months'," it would have been "enormously burdensome", it would have required expenditure of "an astronomical amount" by Toolco (Petition, pp. 9, 16, 17).

Toolco had already taken depositions of its own for much longer than "a good two or three months." The "enormous" burdens of the litigation to Toolco were no less burdensome to TWA. As to the "astronomical cost", whatever the true cost might have been of a single deposition to Toolco, it could not have been significantly different for TWA.

Toolco's own answer alleges that it had assets in 1961 and 1962 of "several hundred million dollars" (Toolco answer, par. 3). TWA on the other hand was near bankruptcy. In 1961 and 1962 it recorded losses totalling over $44 million [AX-478]. At the end of 1962 its remaining tangible assets, less liabilities and deferred credits, were only $62.5 million [AX-476]. It was TWA, not Toolco, that was under a near-breaking financial strain. It was TWA, not Toolco, which might be ruined if the cost and delays of this litigation were unnecessarily multiplied.

Why, then, the flat refusal to permit further discovery? Plainly because this particular discovery might bring out the truth. That was why defendants made a "business decision" to prevent further discovery at all cost. They gambled that they could minimize their risks by depriving TWA of the access to evidence which the Federal Rules normally guarantee to a plaintiff as to any other party, and to which the court had held TWA entitled.*

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* Defendants pretend to find a precedent for their "election" in the position taken by the government in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) (Petition, p. 14). The crucial difference, however, is that in both *Procter & Gamble* and *United States* v. *Ryan*, 402 U.S. 530 (1971), which defendants also cite, refusal to comply with the discovery orders was directed at testing the validity of the discovery orders themselves. Both cases make plain that if the discovery orders were lawful, the disobedient litigant would suffer the appropriate sanction for his refusal.

By the various references to Manuals and Handbooks (Petition, pp. 15-18), defendants seek to suggest the existence of a body of authority that mandates the precise order of depositions and timing of pretrial conferences, depriving the trial court of all discretion. In fact, of course, the situation is quite otherwise.

> "The suggestions made herein are subject always to the discretion of each judge to adapt the procedures to the particular case or to deviate and innovate where necessary or desirable." MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, at 0.4 (1970).

In this case, from the time the complaint was filed, the case was given the most careful attention in the district court; a single judge presided over it for all purposes; a special master was appointed to supervise discovery and close control over all discovery was maintained by the district judge; and defendants' contentions were carefully considered—not just once, but many, many times. It is this close attention and continuous supervision that the Manuals and Handbooks are concerned with, not any mechanical series of orders—and particularly not any automatic grant of indefinite absolute priority of discovery to a filibustering defendant.

By their interrogatories and their motion for a Rule 16 proceeding, defendants were seeking not just a definition of issues—the pleadings had accomplished this—but a limitation of issues, a binding order as to what TWA would have the right to prove at trial. Judge Metzner held that TWA should have access to the key witness before answering interrogatories of this character, and stated that the deposition of that key witness would "facilitate an intelligent ruling" upon the Rule 16 application by the court [20t]. Many experienced commentators have agreed that adequate prior discovery is essential to proper use of these

procedures. Discussing the New Jersey state practice, Mr. Justice Brennan said in 1956:

> "It is our conviction, justified by experience, that the full benefit of pretrial conference procedure will not be realized unless each litigant is afforded in advance of the conference the fullest possible opportunity to find out all he can as to his own and his adversary's case." W. BRENNAN, *Pretrial Procedure in New Jersey—A Demonstration,* 28 N.Y.S. BAR BULL. 442, 445 (1956).

This relationship between adequate discovery and issue-limiting pretrial procedures is equally apparent in federal practice. A symposium held in 1951 on "The Practical Operation of Federal Discovery" produced this comment by United States District Court Judge Bard of the Eastern District of Pennsylvania:

> "Pre-trials are valueless unless there has been liberal use of discovery, or unless there has been a free voluntary exchange of information which is frequently given now because of the discovery provisions in the federal rules. In other words, the discovery procedure has induced pre-trials and made pre-trials effective." (12 F.R.D. 131, 153)

Professor Moore's FEDERAL PRACTICE RULES PAMPHLET (1971) says at p. 641:

> "The deposition and discovery rules are particularly helpful in obtaining factual data as a basis in moving for and opposing motions for summary judgment. * * * And in affording the parties and the court with a knowledge of the case *so that pretrial Rule 16 may function properly.*" (emphasis added)

See also J. WRIGHT, *Pre-Trial on Trial,* 14 LA. L. REV. 391, 399-400 (1954) ("Much of the benefit from pre-trial is impossible without discovery").

Defendants are not simply arguing that it would be better practice for this Court to require trial courts to engage in

preliminary issue-limiting procedures before permitting a plaintiff to engage in pretrial discovery. They are arguing that this is not a matter for the exercise of judgment at all. They assert they were entitled to limit the issues before the deposition as a matter of due process—a constitutional right of defendants.

If that is true, the present Federal Rules could hardly withstand constitutional attack. Rule 26(d), for example, now expressly contemplates as the *normal* procedure that there should be no such thing as absolute priority of discovery, even on a temporary basis, and a defendant who has a legitimate interest in avoiding or narrowing discovery must seek his remedy under Rule 26(c) or not at all. Professor Fleming James points out as to the specific contention that a Rule 16 proceeding should have preceded the Hughes deposition:

> "Rule 16 does not compel the federal district courts to hold pretrial conferences and it leaves the court which does use it the greatest latitude in prescribing the time and manner of holding it." F. JAMES, CIVIL PROCEDURE 223 (1965).

For, as has been generally agreed by all commentators:

> "• • • one of the principal ideas embodied in the rules is that it is wise to leave many details of procedure to the informed discretion of the judge, acting in the circumstances of the particular case, rather than regulating such details by rigid provisions." C. A. WRIGHT, FEDERAL COURTS 433 (2d ed. 1970).

It is frivolous for defendants to contend, as they do, that the district court abused its discretion in 1963 in deciding when to hold a hearing to narrow the issues. It is presumptuous to present that contention to this Court as an important question of law, and it is nothing short of absurd to denominate it as a question of constitutional law, involving deprivation of due process rights.

B. It is not a violation of due process to enter and enforce a default judgment under Rule 37 against defendants who wilfully and with full knowledge refuse to permit discovery of evidence of vital importance on all contested issues. (Petition, Section B)

Defendants themselves admit that:

> "When [defendants] filed their Notice of Position they took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint." (Petition, p. 23)

These two sentences, although obscured by defendants' assault upon this Court's holding in *Thomson* v. *Wooster*, 114 U. S. 104 (1885), still amount to a concession that the rulings below as to the effect to be accorded the default judgment in this case were correct.

As the Brownell Report and the opinions of the district court and the court of appeals make clear, the judgment in this case is grounded upon specific well-pleaded allegations of TWA's complaint, allegations originally placed in issue when defendants appeared and answered, but which they could no longer challenge because of their default. Since defendants' decision to bar discovery into the critical issues effectively blocked all access to evidence of the motives and intent that led defendants to act as they did, no other result from that "business decision" was ever conceivable, and it is apparent on the record that no other result was expected by defendants at the time. As Chester C. Davis, Toolco's counsel, stated to the court:

> "I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings." [2d Cir. App. A-274]

And again:

> "The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose * * *." [2d Cir. App. A-275]*

Summarizing, in response to TWA's statement that the Hughes deposition should proceed, "business decision" or no "business decision", Mr. Davis also said:

> "* * * if it will help your record, Mr. Sonnett, on Monday * * * you can note the fact that the Tool Company is failing in [*sic*—and?] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it." [2d Cir. App. A-297]

As Judge Kaufman stated for the court of appeals:

> "It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it." (449 F.2d at 63-64) [127a]

If defendants were right, the correct litigation tactic for any defendant charged with an antitrust violation, proof of which lies largely in his own hands, would be (a) to attempt to wear down the plaintiff by extended discovery, (b) to refuse any significant discovery himself and instead default, (c) to continue to assert his innocence, and (d) to count on exoneration because the plaintiff would be left

* See, also, statements quoted at p. 17, *supra*.

without the means of proving liability.* The result would be a true denial of due process: the plaintiff would be denied not just the rights accorded to him under the Federal Rules, but effective access to the courts upon his claims. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 351 (1909).

Under present law, a refusal to make discovery in a civil case is, as it should be, rare indeed. Defendants refer to no other case where such a refusal was described as an "election" and justified as a "business decision". But in those rare cases in which, for whatever reasons, defendants have wilfully refused to permit lawful discovery of important evidence, the courts have consistently found that entry of a default judgment "was compelled * * * in order to protect the statutorily-created right of discovery and the constitutionally-guarded due process rights of plaintiff." *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970); see also *Jones* v. *Uris Sales Corp.*, 373 F.2d 644, 647-48 (2d Cir. 1967); *Pioche Mines Consolidated, Inc.* v. *Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); *Fong* v. *United States*, 300 F.2d 400, 408-09 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); *Michigan Window Cleaning Co.* v. *Martino*, 173 F.2d 466, 468 (6th Cir. 1949). These cases confirm the basic wisdom of the presumption announced in *Hammond* v. *Arkansas*, that the refusal to produce material evidence is an admission of want of merit in the asserted defense. That is the analysis, of

* These tactics would open a novel means of evading this Court's repeated admonition against deciding complex antitrust litigation on motions to dismiss or for summary judgment while issues of anti-competitive motive and intent remain unresolved by trial. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962) ("* * * summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."). *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 499-500 (1969); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700, 704 (1969).

course, which was expressly relied upon by the Advisors (see Original Committee Note of 1937 to Fed. R. Civ. P. 37) when they developed the system of pretrial discovery, enforceable by all of the sanctions provided for in Rule 37, which today forms the basic framework for the administration of civil justice in the federal courts.*

Defendants' present criticism of *Thomson* v. *Wooster* as a museum piece and their rejection of the standards fixed by it reflect a remarkable change in the move to Washington from New York. Typical of their previous view is their description of *Thomson* v. *Wooster* in 1965 as "the fountainhead of judicial wisdom on the effect of a default" (Memorandum in Opposition to Plaintiff's Motion for Interim Findings of Fact, June 2, 1965, p. 15). Rationally, a default judgment grounded upon a refusal to permit discovery essential to plaintiff's case could have no other effect than that given it by the courts below, grounded on the principles laid down by this Court in *Thomson* v. *Wooster* and *Hammond* v. *Arkansas*.

Charges that the allegations of TWA's complaint are "conclusory" or mere "legal conclusions" cannot assist defendants. The distinctions which they are trying to make are at best a throwback to 19th century pleading and are as semantically incorrect in those terms as they are under the present Rules. Nothing makes this clearer than defendants' own example to illustrate the kind of complaint in which "the facts admitted by the default give rise to

* Defendants throughout the petition refer to the final judgment below as if it were a money fine imposed by the district court as a punishment for Toolco's contemptuous conduct [*e.g.*, "The judgment below for $145 million * * * was entered as a sanction under Civil Rule 37" (p. 4); defendants "were penalized by entry * * * of a default judgment * * * 30 times the largest judgment ever awarded * * *" (p. 22); and see n. 20 at p. 23]. Of course, the default judgment carried no money amount whatever; $137 million (and cost of suit) was awarded, after hearing, because Toolco had admitted, by its default, that it violated the antitrust laws and injured TWA thereby and because TWA proved the actual amount of its damages to be over $45 million.

liability" (Petition, p. 21). According to defendants, one such complaint is that which "• • • alleges that on a particular day at a particular place defendant negligently drove a motor vehicle against plaintiff as a result of which plaintiff was thrown down and had his leg broken and other injuries• • • " (*ibid.*). The allegation that defendant "negligently drove a motor vehicle against plaintiff" is, of course, admitted by a default. But whether that admission of *negligence* is an admission of fact or of mixed fact and law, or of a conclusory allegation, is immaterial to the effect to be accorded the admission by default. The allegation is proper, material and traversable and by defaulting a defendant admits it, and all the legal consequences that flow from it. *Harshman* v. *Knox County,* 122 U. S. 306, 316-17 (1887).

As early as *McAllister* v. *Kuhn,* 96 U. S. 87 (1877), a case cited by defendants (Petition, p. 21), this Court held that where a complaint states a cause of action, a defendant's default in failing to answer admits the allegation that defendant *converted* stock belonging to plaintiff:

> "If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to his damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but, for the purposes of pleading, the ultimate fact to be proven need only be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action." (96 U. S. at 89)

So *negligence* and *conversion* are typical conclusory allegations of "ultimate fact", the type of fact to which

Pomeroy is referring in the quotation on p. 20 of defendants' petition, the type of fact which is admitted by a default under the rule of *Thomson* v. *Wooster,* which held *validity* of a patent to be admitted. In precisely the same way defendants admitted here, by the default, TWA's allegations of *conspiracy to restrain and monopolize and attempt to monopolize* a particular segment of trade or commerce, set out in paragraphs 9 and 10 of the complaint [2d Cir. App. A-8-10]. These allegations as to the overall scheme in which defendants were engaged, and of the relation to that scheme of the specific acts that injured TWA and are the basis for TWA's recovery, must be taken as admitted by the default, no less than the allegation of negligence in defendants' example, the allegation of conversion in *McAllister* v. *Kuhn,* or the allegation of the validity of the reissued patent in *Thomson* v. *Wooster.**

Defendants' suggestion (Petition, pp. 21-22) that antitrust cases should be treated differently because they present difficult and complex questions is wrong in present law and unsound as a suggestion for future policy. Private antitrust plaintiffs are not a disfavored class of litigants upon whom specially onerous burdens of pleading and proof are to be placed. *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U. S. 134, 139 (1968); *Radovich* v. *National Football League,* 352 U. S. 445, 454 (1957) ("* * * this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws").

* In *Fong* v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U.S. 938 (1962), the defendant's refusal to return from South America to complete a deposition in progress resulted in entry of a default judgment against him. That default judgment was accorded the same effect as the default judgment here. When defendant sought at the damage hearing to require the government to prove the allegation in its complaint that he was the *alter ego* of certain corporations and hence responsible for their acts, the court ruled that this critical allegation (of "ultimate fact", in the old terminology) was admitted by his default and not subject to challenge (300 F.2d at 409).

In the unique circumstances here, the courts below could have done nothing other than what they did.

C. There is no basis in law or in conscience for defendants to pay less than the full amount of damages for which they were found liable after a contested evidentiary damage hearing. (Petition, Section C)

1. The supposed conflict of authority as to the propriety of permitting an *ad damnum* clause to be amended in a case like this is wholly imaginary, and the petition is able to construct that imaginary conflict only upon a misstatement of the order of events surrounding defendants' default.

However early defendants may have reached their decision to refuse discovery, it was not until the hearing before Judge Metzner on February 8, 1963 that their studied noncompliance with the court's discovery orders was formalized as a default. The transcript is clear that, as the court of appeals states,

> "* * * at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million." (449 F.2d at 79) [157a]

Although on notice of TWA's intention to amend, defendants nonetheless went forward with their default. Three months ensued before the default judgment was actually entered against them on May 3, 1963 during which not the slightest suggestion was heard from defendants that they would be willing to remedy their default. The petition's argument of the supposed question in terms of "due process" and "basic justice" is simply not justified by the facts of this case, as those facts have been found by the courts below.

2. In any event, TWA was entitled to recover the full amount of the damages which it was able to prove. The

courts below agreed that this was the only just interpretation of the Rules where a claim for damages in an unliquidated amount is involved, the default followed appearance and answer, and plaintiff at the damage hearing would be required to prove, and defendants in a position to contest, every dollar of the claimed damages.

There is no contrary authority to the position taken by the courts below. In his opinion permitting the amendment Judge Metzner cites *Peitzman* v. *City of Illmo,* 141 F. 2d 956, 962 (8th Cir.), *cert. denied,* 323 U.S. 718 (1944), which —although the facts of the case are somewhat confused— plainly stands for the proposition that if the defendant is in a position to contest the plaintiff's proof of damage, he is liable for the entire amount found to be proven. Both Judge Metzner and the court of appeals refer to *Riggs, Ferris & Geer* v. *Lillibridge,* 316 F.2d 60, 62-63 (2d Cir. 1963), which deals with the basic principle that damages if unliquidated must be proven in their entirety, and that a plaintiff under the modern procedure can obtain such damages (or other relief) as he can prove he is entitled to. In *Sarlie* v. *E. L. Bruce Co.,* 265 F. Supp. 371, 377-78 (S.D.N.Y. 1967), the district court in a default case reached the same conclusion as was reached in the instant case. Professor Moore is in accord. See 6 J. MOORE, FEDERAL PRACTICE ¶54.61, at p. 1206, ¶55.08, at p. 1823 (2d ed. 1971).

Fong v. *United States,* 300 F.2d 400 (9th Cir.), *cert. denied,* 370 U. S. 938 (1962), does not take a contrary view. In the *Fong* case there were originally several claims for relief, some of which claimed actual damages for such matters as conversion and wrongful sale of the vessels which were the subject matter of the action. A contract claim for liquidated damages per ship of $100 per day for each day up to 180 days during which the vessels were not scrapped and $25,000 for any period thereafter was upheld; the other claims were held insufficient as

a matter of law. After appearing, the defendant defaulted and was forbidden to contest the factual allegations of the complaint. Judgment by default was entered against him after a damage hearing at which the government sought to recover actual damages in addition to liquidated damages. On defendant's motion, the court amended its judgment to limit the award to the liquidated damages, rejecting the government's argument that the demands made in the insufficient claims could be used to support the higher recovery. The Court of Appeals for the Ninth Circuit held that, since each claim seeking actual damages had been found not to state a claim, it would be unjust to import into the single sufficient claim the entirely different theories of damage computation embodied in the insufficient claims.* There is no conflict between that decision and the decision reached below.

Any other result than that reached below would be contrary to the principles which the Federal Rules were intended to embody. Certainly, Fed. R. Civ. P. 54(c) is to be read in conjunction with the provision of Fed. R. Civ. P. 15(a) that leave to amend a pleading "shall be freely given when justice so requires." Since defendants were on notice, before their default, of TWA's intention to amend its *ad damnum* clause and in fact exercised their right to defend as to the amount of damages, permitting the amendment was plainly just.

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* The United States did not petition for certiorari; the petition which was filed and denied was by the defendant and based on an asserted right to dispute well-pleaded allegations of the complaint despite his default. See footnote, *supra*, p. 37.

D. The default judgment was not precluded by the Federal Aviation Act or any action of the Civil Aeronautics Board. (Petition, Section D)

Defendants' arguments, now as in 1965, are directed to the interpretation and application of particular orders of the CAB issued many years ago and without any continuing effect whatever today. After full briefing and argument, this Court declined to consider these issues of antitrust exemption when the case was last here seven years ago. There is no reason why certiorari should be granted to consider them now. Recent decisions of this Court and of the courts of appeals in cases like *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 220-23 (1966), have adequately charted the law. Compare, for example, *Allied Air Freight, Inc.* v. *Pan American World Airways*, 393 F.2d 441, 445-48 (2d Cir.), *cert. denied*, 393 U. S. 846 (1968).

None of defendants' activities which have been held to have violated the antitrust laws, and none of the specific actions resulting in injury to TWA, for which TWA has been awarded damages, has ever been approved by the CAB, formally or informally, by order or otherwise. The orders on their face plainly include no such approval. The CAB expressly stated in its brief *amicus* on the prior review in Nos. 443 and 501, October Term 1964, that no such approval was ever intended, and that it lays no claim to the power to immunize such activities from the reach of the antitrust laws even if it had the desire to do so.

It is by no means clear that defendants are entitled to raise these matters following a default for refusal to permit relevant discovery. Neither the defense that their conduct was exempted from the antitrust laws by order of the CAB nor the related defense urged on the prior appeals that the subject matter of the claims was within the "primary jurisdiction" of the CAB is jurisdictional, in the

sense of going to the power of the district court to hear and determine the questions presented to it. *Cf. Bell* v. *Hood,* 327 U. S. 678 (1946). Indeed, they are plainly affirmative defenses which under Fed. R. Civ. P. 8(c) are to be pleaded as such. Defendants' refusal to allow discovery to proceed prejudiced the consideration of the defenses of primary jurisdiction and antitrust exemption, just as it did of the other issues raised by the pleadings.

In any event, the district court and the court of appeals correctly concluded that the conduct alleged in the complaint and which formed the basis for the default judgment was not exempted or insulated from antitrust prosecution. To establish an exemption defendants must bring their conduct within the scope of the Board's authority, and point to orders of the Board conferring the exemption. They can do neither.

The only relevant authority of the Board to exempt conduct from the antitrust laws derives from Sections 408 and 414 of the Federal Aviation Act, 49 U.S.C. §§ 1378, 1384. Section 414 provides, in pertinent part, that any person affected by any order made under Section 408 "shall be, and hereby is, relieved from the operation of the 'antitrust laws' * * * insofar as may be *necessary* to enable such person to do anything *authorized, approved* or *required* by such order" (emphasis supplied).* Section 408(b) provides, with respect to an acquisition of an air carrier by a person engaged in any other phase of aeronautics that:

> "Unless, after such hearing, the Board finds that the * * * acquisition of control will not be consistent

* The language of Section 414 is perfectly clear that the exemption, if it applies at all, is not only from the "antitrust laws" but from "all other restraints or prohibitions made by, or imposed under, authority of law * * *." Literally, this would include the restraints of the common law applicable, *e.g.*, to frauds, deceits, and breaches of fiduciary duty. Such broad language emphasizes the importance of Congress's further direction that the exemption should only be available "insofar as necessary" to enable the doing of something "authorized, approved or required."

with the public interest or that the conditions of this section will not be fulfilled, it shall by order *approve such * * * acquisition of control,* upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *." (emphasis supplied)

It is evident from the language of these provisions that the Board's only power is to approve the acquisition and the only thing exempted is the acquisition itself. The default judgment here, however, is not based upon an allegedly unlawful acquisition.

Judge Lumbard put the matter succinctly in his opinion for the Second Circuit in its first review of this case:

> "Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter." (332 F.2d at 608) [27a]*

The original orders authorizing the acquisition of first 45% and then 73% of TWA's stock were intended, as the court of appeals found, only to approve the acquisitions, nothing more (332 F.2d at 610) [30a-31a]. This was all the Board could approve and all it did approve. The subse-

* In its brief *amicus* when the case was previously before this Court, the CAB strongly supported this interpretation:

> "But orders authorizing control do not approve prospectively all things that may be done in the exercise of control; and the Board's orders did not permit Toolco to utilize its power as a means of violating the antitrust laws. As the court below summarized TWA's complaint, it charges 'the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce' (332 F.2d at 611). Such conduct plainly did not constitute acts 'necessary to enable' Toolco to do 'anything authorized [or] approved' by the Board's order." (p. 15)

quent orders amending the original orders to permit particular transactions in no way broadened, nor could they have broadened, the scope of the exemption which flowed from the original orders.

The Board, in its *amicus* brief, confirmed the accuracy of this construction of its orders and pointed out that its concern was only to prevent Toolco from pressing unneeded equipment on TWA, not to police possible antitrust violations:

> "• • • no immunity was conferred by the various orders modifying the basic orders of approval.• • • The orders were entered solely on the basis of motions filed by TWA, and without hearings or adversary pleadings. The Board stressed the limited nature of its approvals by pointing out that it was appraising the transactions in the light of the original intent of the restriction in the control order, thus focusing upon whether Toolco was using its control relationship to sell to TWA aircraft not economically justified by its operation. It also stated that it was not passing upon the reasonableness of the transactions for ratemaking purposes. *In short, the Board did not purport to approve anything but the specific transactions involved, and the misconduct alleged in the complaint was no more necessary to the consummation of those transactions than it was to the original acquisition of control.* (Amicus brief, pp. 15-16) (emphasis added)

The CAB is without jurisdiction under the Federal Aviation Act over either the acquisition of equipment by air carriers or their financing. Moreover, no CAB order ever dealt at all with the particular transactions which caused injury to TWA. TWA was awarded damages for the following actions of defendants, each taken pursuant to the conspiracy and attempt to monopolize alleged in the complaint:

> (1) Precluding TWA from ordering Boeings in 1955:—no CAB order approved such preclusion;

(2) Diverting 6 Boeings to Pan American:—no CAB order approved such diversion;*

(3) Denying 10 Convairs to TWA:—no CAB order approved such denial;

(4) Preventing timely delivery of 20 Convairs to TWA:—no CAB order approved such prevention;

(5) Conditioning the leasing of planes to TWA upon TWA's acquiring planes from no one else:—no CAB order approved such condition; and

(6) Disrupting the training of TWA's flight crews and ground personnel:—no CAB order approved such disruption.

The real thrust of defendants' argument, as the courts below and the CAB have recognized, is that when Toolco was authorized to acquire control, they secured blanket immunity from the antitrust laws. The ruling of the court of appeals that they did not, that the legality of the acquisition of control does not carry with it the legality of each exercise of that control, is a simple application of principles which this Court has consistently taught. See *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707 (1962). It has long been emphasized that statutory provisions granting or authorizing exemptions from the antitrust laws are to be kept within the narrowest of limitations. *E.g., United States* v. *Borden Co.*, 308 U.S. 188, 206 (1939); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456-57 (1945); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United*

* Toolco seeks to present these diversions and those of the Convair 880s to Northeast as if they did not involve dealings in aircraft —profitable dealings—by Toolco (Petition, pp. 11n, 24n). They were assignments of contracts for planes, at a profit. The diversion of the Boeings is described in Pan American's Annual Report for 1959 as follows:

> "Six long-range Intercontinentals were *purchased from Hughes Tool Company* during the year at a cost of $40,000,000." [AX-868; emphasis added]

With the working papers withheld, the details are not available, but Toolco's secret tax returns leave no doubt that its profit in deals like this in 1959 and 1960 amounted to many millions of dollars.

States v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). Even without that cautionary rule, however, it would be plain that nothing the Board has done had the effect of immunizing from liability the conduct which formed the basis of the present judgment.

Once it is concluded that the Board has not expressly exempted Toolco's conduct from antitrust liability, no viable argument of primary or exclusive agency jurisdiction remains. The court of appeals in 1964 carefully and accurately distinguished *Pan American World Airways* v. *United States*, 371 U. S. 296 (1963), pointing out, *inter alia*, that in that case the conduct complained of was at the heart of the Board's jurisdiction whereas here the conduct was beyond the Board's reach, and that there injunctive relief was sought, of a kind which could be provided by the Board whereas here TWA seeks treble damages for past conduct, which the Board has no power to award. In *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966), this Court emphasized the difference:

> "The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." (383 U. S. at 222)

This observation is particularly pertinent here since the CAB has not only no remedy available to give TWA redress, but no continuing jurisdiction at all over Toolco's conduct.*

* The court of appeals pointed out (332 F.2d at 609) [29a] that the Board's jurisdiction to deal at all with Toolco's conduct vis-a-vis TWA probably expired in 1960 when Toolco ceased to control TWA. Toolco misses the principal point of the court of appeals comment when it suggests (Petition, pp. 27-28) that the situation is somehow altered by TWA's decision not to attempt to prove damages attributable to Toolco's post-1960 conduct. The point is that after 1960 the Board lacked power to reach any of Toolco's conduct, whether it antedated or post-dated 1960. The Board simply lost jurisdiction over Toolco—and could only regain it in connection with a new acquisition of control.

E. That Toolco "mismanaged" TWA's affairs is no defense to charges under the antitrust laws. (Petition, Section E)

It is obviously no defense to antitrust charges that a parent's conduct also amounted to "breach of fiduciary duty" and "mismanagement" (Petition, p. 34). *Cf. Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 40 U.S.L.W. 4001, 4003 (U.S. November 8, 1971), rejecting a similar argument that mismanagement that also amounts to illegal conduct in connection with the purchase or sale of a security is not cognizable under the Securities Exchange Act. Such an argument, indeed, comes with singular ill grace from a "fiduciary" which, having chosen concealment over disclosure, has defaulted to antitrust charges instead of complying with discovery orders.

Before their wilful default, it was open to defendants to prove, if they could, that nothing which they had done amounted to anything more than normal oversight by Toolco of the aircraft acquisitions of its 78%* subsidiary. That argument, however, is no longer open. The basic charge of the complaint was that Toolco's arrogation of all authority for buying aircraft was illegal and violated the antitrust laws because it was pursuant to, and a principal part of, defendants' unlawful scheme to make TWA a "captive market" upon which defendants could build in fulfilling their purpose to secure a dominant position in the supply of aircraft to air carriers. Judge Kaufman's summary of TWA's complaint (449 F.2d at 64-65) [128a-130a] emphasizes that the specific acts alleged, upon which the damages ultimately awarded were based, all were "performed in furtherance of the offenses charged and for the improper purposes alleged" (449 F.2d at 65) [129a].

* During the critical 1955-56 period, Toolco owned 74% of TWA's stock. It had started buying stock in 1939 and by 1945 had accumulated 45%, which increased to 73% in 1948. The 78% was not reached until 1958.

It is mere sophistry, under these circumstances, to assert that the court of appeals' decision "extends to a startling degree the liability of a parent corporation for determining the manner in which its subsidiary does business" (Petition, pp. 33-34) or amounts to a ruling that "a parent that decides that its subsidiary should buy from X rather than Y may be held liable for antitrust damages if, with the wisdom of hindsight, the subsidiary can show that the decision was unwise" (Petition, pp. 34-35).* Such statements, like the assertion that "the *mere* fixing by a parent of a subsidiary's price of production or the selection by the parent of those persons with whom its subsidiary may or may not deal" is not, without more, *per se* illegal (Petition, p. 34, emphasis added) have no relevance to the present case.

TWA's success in a trial on the merits was in no way dependent on a showing of *per se* violations, as this Court reaffirmed recently in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 499-500 (1969). All that was required of TWA was to plead allegations which, taken as a whole, spelled out violations whether *per se* or not. It did so.

The fundamental issue of defendants' motivation and intent in limiting to Toolco the acquisition of all aircraft for TWA was raised by the allegations of the complaint and the denials in defendants' answers. It was a proper subject for discovery and a matter to be determined at trial (*supra*, pp. 10-11). But defendants chose not to defend on the merits, and they cannot now pose as an issue for this Court one that presupposes their motives to have been only the innocent anxiety of a parent for its subsidiary's welfare.

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* Whether defendants' decisions were wise or unwise is irrelevant here, but TWA's damages show how costly they proved for TWA, while Toolco's secret tax returns show how profitable they were for Toolco.

F. **Defendants cannot refuse discovery and defend on the merits on the basis that there is no proof they were more than "potential" competitors. (Petition, Section F)**

> "We cannot say that proof at a trial—prevented by Toolco's conduct—that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, *if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint,* to support an antitrust judgment for TWA." (449 F.2d at 67) [134a] (emphasis added)

These words have been omitted from the quotation in which defendants discern the "potential competition" theory that they then go on to belabor (Petition, p. 37n). The omission demonstrates that this attack is directed against a straw man.

The court of appeals did not formulate any new substantive rules, let alone devise "a Clayton Act test for a Sherman Act violation" (Petition, p. 36). In the usual case the trier of fact would decide what role the alleged antitrust violator had played and what effect his alleged antitrust violations had had within the relevant field of commerce. Here, however, defendants barred TWA from access to evidence about this subject and attempted instead, on the basis of the limited evidence offered at the damage hearing, to convince the Special Master and the courts below that Toolco had nothing at all to do with the business of supplying aircraft to air carriers. The question which those courts had therefore to consider was whether the evidence to which Toolco pointed was such as to foreclose the possibility that TWA with benefit of discovery would have been able to show that Toolco played a role sufficient to support a finding of an antitrust violation

"under any of the several hypotheses put forward in the complaint * * *." (449 F.2d at 68) [136a]*

Both the Special Master [Brownell Report, pp. 38-42] and the court of appeals (449 F.2d at 67-68) [134a-136a] have reviewed at some length the evidence showing how actively Toolco and Hughes participated in the commercial aircraft market *outside* of the TWA market which they completely monopolized. The district court also referred to certain of the relevant evidence in confirming the Special Master's *refusal* to find that Toolco never engaged in the manufacture or supply of commercial transport aircraft to United States air carriers in competition with manufacturers and suppliers of such aircraft (308 F. Supp. at 686)

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* The court of appeals catalogued these "several hypotheses" as including

> "* * * in addition to the *Yellow Cab* theory [*United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947)], (1) unlawful intent to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502-503 (1969); and (5) the lease of aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949)." (449 F.2d at 68-69) [136a-137a]

Defendants refer to none of the cases cited in the above quotation. Indeed, the only decision by this Court in a private antitrust case mentioned by defendants is *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), cited for a non-antitrust proposition (Petition, p. 18n).

[60a]. Defendants continue to ignore such matters as Toolco's sale of Boeings to Pan American, leases of Convairs to Northeast, and temporary corner on jet engines in 1956—marketed "in competition to Pratt & Whitney", as that manufacturer complained [2d Cir. App. A-178-79].

The express assumption of this particular argument as stated by defendants in their summary formulation in "Questions Presented" No. 6 (Petition, p. 4) is that Toolco "has in no way restrained or monopolized a particular area of commerce."

That assumption is contrary to the findings by the Special Master and the courts below. It is negatived even by the limited evidence that defendants permitted to be developed before their default. It contradicts essential allegations of TWA's complaint. The argument based on it is simply not available on the record.

G. The Special Master and the courts below correctly found that TWA, in proving the amount of its damages, had demonstrated that each item recovered flowed from the allegations of unlawful conduct and resultant injuries admitted by defendants' default. (Petition, Section G)

Defendants again ignore the state of the record in making their "proximate cause" argument.

The answer to Mr. Justice White's question—"How can you prove how much you have been damaged without showing what you have been damaged from?" (see Petition, p. 39) is that TWA did in fact show what it was damaged from. Despite what would appear from defendants' selective quotations from the court's opinion (*cf.* Petition, p. 40), the court of appeals so found:

> "The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because,

> however, the damages were unliquidated and uncertain, F.R. Civ. P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show 'proximate cause'. On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents." (449 F.2d at 70) [144a]

TWA was damaged by the specifically pleaded deprivations it suffered in its jet fleet—inadequate in number, received too late, initially available only through day-to-day leases from Toolco—as a result of the defendants' primary concern with establishing themselves as suppliers of aircraft to air carriers generally [see complaint, pars. 9, 10, 14, 17-20, 22-24, 26, 28, 49-53]. As to the effect to be given to these allegations see pp. 35-37, *supra*. The amount of the losses which TWA suffered from these fleet deprivations was proven in the course of a bitterly contested two-year hearing before the Special Master, whose 323-page Report is itself a complete refutation of defendants' pretense that proof of damage was lacking. The Special Master's findings with respect to each of TWA's damage claims were expressly related to the allegations of its complaint [Brownell Report, pp. 45, 100-01, 112-13, 168-69, 186-87, 194, 224-26, 265, 296, 302-03]. Judge Kaufman found that TWA "did not

rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA" (449 F.2d at 72) [144a].

Apart from disagreeing (Petition p. 40) with this express finding, defendants utilize their "proximate cause" argument chiefly to argue that TWA failed to prove that it could have financed the acquisition of additional jets.

TWA historically received and paid for 47 jets. TWA presented evidence that, except for defendants' activities, it would have received 6 additional Boeing B-331 jets and 10 additional Convair 880 jets. This evidence was accepted by the Special Master, who expressly found that the resulting "hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages * * *" [Brownell Report, p. 56]. As to the financing of this additional equipment, the Special Master found that (a) "the full purchase price of [the 6 additional Boeings] and related spare parts and equipment [would have amounted] to a capital expenditure of $43.1 million" [Brownell Report, p. 149], and (b) "the full purchase price for [the 10 additional Convairs] and related spare parts and equipment would have amounted to $48.1 million" [Brownell Report, p. 150]. Thus, a total of $91.2 million of additional funds would have been needed to acquire the 16 jets that defendants' unlawful conduct kept TWA from acquiring. The Special Master, for purposes of his "cost of capital" computations, treated all of these funds as borrowed. In light of the default and his rulings on the evidence, he made what he described as the "fair and reasonable assumption" that "funds were available at the time of the delivery of each aircraft" that TWA did not receive because of defendants' unlawful conduct,

stating that the record was "sufficiently complete to allow these assumptions to be taken" [Brownell Report, p. 148].*

After weighing the very same argument that defendants now put to this Court, the court of appeals held:

> "Assuming then that an independent TWA would have attempted to acquire the same 63-jet fleet ordered by Toolco, defendants contend that TWA would not have been able to finance such an undertaking, which would have cost about $353 million or $93 million more than TWA actually spent for its 47-jet fleet. Toolco notes that $100 million of the financing for the 47-jet fleet was supplied by Toolco itself through its purchase of TWA subordinated debentures. We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time

* The Special Master had before him an extensive body of information relevant to TWA's capability to have arranged for the additional funds if it had not been the victim of defendants' unlawful combination and conspiracy to restrain and monopolize and attempt to monopolize in violation of the antitrust laws. Among other things, the record includes (a) the well-pleaded allegations of TWA's complaint—accepted by the Special Master and entitled to controlling weight in any consideration of what TWA could have done if defendants had not violated the law and injured it [see Brownell Report, p. 254]; (b) expert testimony that an independent TWA could have financed the acquisition of an adequate jet fleet, including the 16 additional jets [AX-353, AX-429]; (c) evidence that each of TWA's principal competitors—United, American and Pan American—successfully financed a fleet larger than the 63-jet fleet (449 F.2d at 74) [147a]; and (d) evidence of TWA's actual financing and the various possibilities available to it to have raised any additional money needed [AX-861, AX-865]. Traffic and accounting studies demonstrated that availability of the earlier and larger jet fleet would have produced a large increase in funds internally generated from operations. The increase in 1959 and 1960 alone would have provided the major part of the necessary funds [AX-479].

> Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allegations of the complaint demonstrate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶ 17, 18, 19, 22, 23, 24, 26, 50, 51 and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted." (449 F.2d at 74) [147a].

Thus, defendants' "proximate cause" argument simply ignores both their default and what was decided below.

As for their concern for "loosening of the requirements of proof in antitrust litigation" (Petition, p. 41), this Court's views need no reaffirmation. The basic guidelines for determining the amount of damages to be awarded a plaintiff injured by violations of the antitrust laws were laid down in *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931); and *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). The Court has never departed from the rules set forth in those three cases, but has reaffirmed them again and again—most recently in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

As this Court noted in *Bigelow*, "The most elementary concepts of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created" (327 U.S. at 265). By defaulting, defendants admitted the antitrust violations alleged in the complaint, and the fact that injuries resulted from those violations. All that was left was to calculate the amount of damages necessary to compensate TWA for those in-

juries. That amount was determined in the Brownell Report, which the court of appeals characterized as reflecting "an extraordinary awareness of the issues raised and the applicable principles of law" (449 F.2d at 73) [144a]. Twice that Report has been painstakingly reviewed and confirmed in all respects, first by the district court and then by the court of appeals. As the court of appeals observed:

> "Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The default itself by Toolco rendered precise proof of damages even more difficult than in the usual antitrust case, where the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing." (449 F.2d at 73) [145a]

H. The precedential impact of the decisions below. (Petition, Section H)

Defendants pretend that the decision below "is an outrage" which will "inflict serious wounds on sound principles of procedure and antitrust law" and "impose heavy burdens on the Federal Courts." In every respect except the factual determination of the amount of TWA's damages, the decision below is nearly eight years old, and this Court's dismissal of certiorari occurred seven years ago. No such impact has been visible. No court has suggested disagreement with the earlier decision, nor, indeed, has any court suggested that that decision broke any new ground. No great number of defendants has "elected" to defy discovery orders, but instances of such defiance were equally rare before.

The one real possibility that the course of this litigation would result in drastic changes either in procedure or in substantive law would arise if the litigation were to culminate in defendants' arguments being upheld.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

DUDLEY B. TENNEY
80 Pine Street
New York, New York 10005
Counsel for Respondent
Trans World Airlines, Inc.

Of Counsel:

PAUL W. WILLIAMS
IMMANUEL KOHN
RAYMOND L. FALLS, JR.
WILLIAM T. LIFLAND
MARSHALL H. COX, JR.

CAHILL, GORDON, SONNETT,
REINDEL & OHL
80 Pine Street
New York, New York 10005

January 21, 1972

Pretrial Order, September 7, 1961

[Doc. 44]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held in this cause on September 6, 1961, wherein the following proceedings were had.

I.

• • •

II.

Plaintiff TWA has already gathered some of the documents called for by the subpoena duces tecum served on TWA on August 16, 1961 by defendant Hughes Tool Co. TWA shall continue gathering the material called for by this subpoena duces tecum and shall complete compliance with the subpoena by Friday, October 13, 1961. Defendant Hughes Tool Co. may commence the inspection and copying of said documents on September 7, 1961.

III.

Plaintiff's motion pursuant to F.R.C.P. 34 shall be argued on September 21, 1961 at 10:30 a.m. in chambers.

Defendant Hughes Tool Co. shall serve and file its papers in opposition prior to 10 a.m. on September 18, 1961.

IV.

The question as to when defendant Hughes Tool Co. shall commence taking depositions and when it shall comply with any order entered on plaintiff's motion pursuant to F.R.C.P. 34 will be argued in conjunction with said motion.

V.

The motion by defendant Hughes Tool Co. to dismiss the complaint pursuant to F.R.C.P. 12 and for summary judgment pursuant to F.R.C.P. 56 shall be held in abeyance. Said defendant shall notify the Court when it desires the motions to be heard. A date will then be fixed for the serving and filing of papers in opposition and argument on the motions.

VI.

The service of subpoenas by defendant Hughes Tool Co. may continue.

SO ORDERED.

Dated: New York, N. Y.
September 7, 1961.

/s/ CHARLES M. METZNER
U.S.D.J.

Pretrial Order, February 7, 1962

[Doc. 59]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Pretrial conferences were held in this cause on January 10, 1962 and January 23, 1962, wherein the following proceedings were had.

• • •

II.

The deposition of the plaintiff by Charles C. Tillinghast, Jr., shall be continued and the depositions of the other witnesses shall be commenced in accordance with the schedule annexed hereto. The Special Master hereinafter appointed may vary this schedule upon application of either party if in his opinion the circumstances require such variance.

III.

Upon the consent of counsel for the plaintiff and the defendant Hughes Tool Company, the Court was empowered to appoint a Special Master. J. LEE RANKIN, ESQ., of 36 West 44th Street, New York 36, New York is hereby appointed Special Master to act in connection with the depositions and other discovery proceedings undertaken by any person now a party or any person who may hereinafter

become a party, with the following powers: to preside over and supervise the conduct of depositions and in connection therewith to rule on such objections to questions, whether heretofore made or to be made, as have not been reserved by stipulation of the parties to the time of trial; to rule on objections, whether heretofore made or to be made, with respect to the production of documents; to make any and all other rulings which may be required pursuant to the provisions of Rules 26 to 37, and 45, of the Federal Rules of Civil Procedure and such other rules as may from time to time become applicable.

IV.

Any action taken or ruling made by said Special Master shall be subject to review by the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, upon timely application with reasonable notice.

V.

The Special Master shall be reimbursed for such expenses as are reasonably and necessarily incurred by him and the compensation of the Special Master is to be fixed at $60.00 per hour. Such reimbursement and compensation are to be taxed as costs at the conclusion of this action; provided, however, that until the taxation of costs the compensation of the Special Master is to be paid at monthly intervals, fifty per cent (50%) by plaintiff Trans World Airlines, Inc., and fifty per cent (50%) by defendant Hughes Tool Company, and provided, further, that such payments shall be subject to reallocation among any additional parties who may hereafter be joined and who may participate in the depositions.

VI.

Defendant Hughes Tool Company shall file its answer to the complaint herein upon the day following the completion, in accordance with the annexed schedule, of the deposition of plaintiff by Charles C. Tillinghast, Jr., Robert W. Rummel and E. O. Cocke.

VII.

The deposition of plaintiff by A. V. Leslie, in view of his present illness, is adjourned without date and shall be re-scheduled by the Special Master upon reasonable notice by the defendant at an appropriate time in light of the health of the witness and at a date not in conflict with the annexed schedule.

VIII.

Any request for a change in the date fixed for the production of writings and other material by the defendant Hughes Tool Company, presently set for March 15, 1962 by order of this Court dated December 18, 1961, shall be made to the Special Master.

So Ordered.

Dated: New York, N. Y.
February 7, 1962

/s/ Charles M. Metzner
Charles M. Metzner
U. S. D. J.

SCHEDULE OF DEPOSITIONS

I.

Depositions Noticed by Defendant Hughes Tool Company

Date	Deponent	Time and Location of Deposition
Feb. 13, 1962	Trans World Airlines, Inc. By: Charles C. Tillinghast, Jr. R. W. Rummel E. O. Cocke	10 a.m. 80 Pine St. New York, N.
Feb. 20, 1962	Charles Thomas	10 a.m. The Irvine Ra 13042 Myford Tustin, Calif.
Feb. 21, 1962	Bank of America By: Keith Carver Robert Gordon	10 a.m. Clerk's Office U. S. Court H Los Angeles, C
Feb. 27, 1962	Bankers Trust Company By: E. F. Ebert	10 a.m., Room 120 Broadway New York, N.
Feb. 27, 1962	Morgan Guaranty Trust Co. of New York By: John Schroeder	2 p.m., Room 120 Broadway New York, N.
Feb. 28, 1962	The Mellon Bank By: Frederick Gwinner Ralph Ehler	10 a.m. Clerk's Office U.S. District C Pittsburgh, Pa
Mar. 1, 1962	Ben-Fleming Sessel Robert A. Kerr Irving Trust Company By: Ben-Fleming Sessel Robert A. Kerr	10 a.m., Room 120 Broadway New York, N.
Mar. 8, 1962	Frederic H. Brandi Arthur L. Wadsworth Dillon, Read & Co., Inc. By: Frederic H. Brandi Arthur L. Wadsworth	10 a.m., Room 120 Broadway New York, N.
Mar. 15, 1962	James F. Oates, Jr. Grant Keehn Equitable Life Assurance Society of the United States By: James F. Oates, Jr. Grant Keehn	10 a.m., Room 120 Broadway New York, N.
Mar. 15, 1962	Warner Mendel	10 a.m., Room 120 Broadway New York

Date	Deponent	Time and Location of Depositions
23, 1962	Harry C. Hagerty Gordon P. Jenkins Metropolitan Life Insurance Company By: Harry C. Hagerty Gordon P. Jenkins	10 a.m., Room 3113 120 Broadway New York, N. Y.
29, 1962	Irving S. Olds	10 a.m., Room 3113 120 Broadway New York, N. Y.
5, 1962	Ernest R. Breech	10 a.m., Room 3113 120 Broadway New York, N. Y.
2, 1962	Boeing Company By: William M. Allen J. O. Yeasting	10 a.m. Clerk's Office U.S. District Court Seattle, Wash.
9, 1962	Prudential Insurance Company of America By: Monroe Chappelear	10 a.m., Room 3113 120 Broadway New York, N. Y.

II.

Depositions Noticed by Plaintiff Trans World Airlines, Inc.

3, 1962	Howard R. Hughes	10 a.m. Beverly Hills Hotel Beverly Hills, Cal.
1962	Hughes Tool Company By: Raymond Holliday	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
5, 1962	Hughes Tool Company By: M. E. Montrose	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
, 1962	Hughes Tool Company By: C. H. Price	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
, 1962	Hughes Tool Company By: C. S. Johnson	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
1962	Hughes Tool Company By: H. E. Rogers	10 a.m., 18th Floor 80 Pine Street New York, N. Y.
1962	Hughes Tool Company By: C. Collier	10 a.m., 18th Floor 80 Pine Street New York, N. Y.

Pretrial Order, July 12, 1962

[Doc. 101]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held today on the respective appeals by the plaintiff and defendant Hughes Tool Company from rulings of the Special Master.

1. Defendant Hughes Tool Company appeals from a ruling of the Special Master overruling Toolco's objections to interrogatories propounded to it by plaintiff. After hearing counsel and reading the papers submitted in support of and in opposition to the appeal, the ruling of the Special Master is modified as indicated below and as modified is sustained.

Interrogatory No. 1 is modified by striking the words "or attorney". It is further modified by limiting any knowledge, information or belief of a director to such knowledge, information or belief which said director has acquired as a director of the defendant Toolco.

As to Interrogatory No. 4, the defendant need not make any answer thereto insofar as any of the named persons in this interrogatory are former employees or consultants.

However, the defendant in its answer to this Interrogatory No. 4 shall indicate which of said persons are former employees or consultants. Insofar as consultants are concerned, the term shall embrace those persons who are in normal usage considered as independent contractors.

Interrogatory No. 7 refers to employees, agents and/or representatives of Toolco. The information requested by this interrogatory shall be furnished as to such persons only if those persons performed services of a personal nature or otherwise for Hughes individually and if such services were compensated for by the defendant and not by Hughes personally.

The dates referred to in the interrogatories shall be computed from the date of this order.

2. Plaintiff has appealed from a ruling of the Special Master denying the motion of the plaintiff for an order determining that rule 4 of the Civil Rules of the United States District Court of the Southern District of New York is applicable in the instant case. After hearing argument of counsel and reading the papers in support of and in opposition to this motion, the appeal is disposed of as follows:

Irrespective of rule 4, the court has the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings. In view of the number of days which the defendant Toolco has devoted to the deposition of Tillinghast, the president of the plaintiff, defendant is directed to complete that deposition on or before July 25th, 1962. It shall commence taking the depositions of the other noticed individuals immediately thereafter. Plaintiff may renew its motion before the Special Master on September

20th, 1962 if at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff.

So Ordered.

Dated: New York, N. Y.
July 12, 1962

/s/ Charles M. Metzner
U.S.D.J.

Opinion and Order, July 24, 1962 (Memorandum Endorsed on Motion Papers Dated May 11, 1962)

[Doc. 93]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Defendant Hughes Tool Company has applied to the court to review the opinion of the Special Master rendered on April 17, 1962 and the order of the Special Master contained in his letter of May 2d, 1962, as modified by his letter of May 3d, 1962, to the extent that the defendant is required to produce for inspection and copying by adverse parties any privileged communications between attorney and client.

The court has reviewed the opinion of the Special Master which appears in the transcript at pp. 4361-4369 and the letters referred to above. The Special Master has made an exhaustive study of the law applicable to the attorney-client privilege. The court agrees that the law is as stated by the Special Master both as to the privilege and the waiver thereof. The court sustains the ruling of the Special Master as he has applied the law to questions presented to him. If there are any specific documents concerning which the defendant desires specific rulings as to their ad-

missibility, they may be submitted to the Special Master pursuant to the directions appearing at p. 4391 of the transcript and in the letter of May 2d, 1962, as modified by the letter of May 3d, 1962.

So ORDERED.

Dated: New York, N. Y.
July 24, 1962

/s/ CHARLES M. METZNER
U.S.D.J.

Pretrial Order, September 21, 1962

[Doc. 122]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held on September 19th, 1962 upon a notice from the attorneys for the plaintiff that it was appealing from so much of the Special Master's ruling of September 15th, 1962 as denied the plaintiff the right to proceed with the deposition of Howard R. Hughes on September 24th, 1962. After hearing counsel for the plaintiff, the defendant Hughes Tool Company and the additional defendants, and after reading the transcript of the hearing before the Special Master on September 15th, 1962, the appeal is disposed of as follows.

Sometime prior to July 12th, 1962 the Special Master evidenced his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was properly reached under the orders of the court. This concern of the Special Master was not aroused in connection with any application by the plaintiff to interfere with the priority of deposition previously determined by order of the court dated February 7th, 1962 as amended by the order of March 5th, 1962. In order to resolve that problem prior to the time of request-

ing Howard R. Hughes to appear as a witness, the Special Master afforded the Tool Company alternative procedures. Either it was to answer certain interrogatories as to the whereabouts of Howard R. Hughes, in order to facilitate the service of a witness subpoena, or counsel for the Tool Company was to provide satisfactory proof that he was authorized to accept service of the subpoena on behalf of Howard R. Hughes.

Interrogatories were framed by the plaintiff and served upon the Tool Company which thereafter were amended by order of the court dated July 12th, 1962. Subsequently, by order dated July 26th, 1962, the time for the Tool Company to answer the interrogatories was fixed for August 27th, 1962. Counsel for the Tool Company then served and filed with the court a document which he asserted gave him the authority to accept service of the witness subpoena on behalf of Howard R. Hughes. At this time the court reserves for future determination any question raised by the plaintiff regarding the authenticity of that document.

Pursuant to the document filed with the court, Chester C. Davis, counsel for the Tool Company, accepted service of a witness subpoena on behalf of Howard R. Hughes on September 6th, 1962. That subpoena was issued out of the United States District Court for the Southern District of California upon the notice by the attorneys for the plaintiff served upon Chester C. Davis, which stated that the deposition of Howard R. Hughes as a witness would be taken at the United States District Courthouse for the Southern District of California in Los Angeles on September 24th, 1962. The return of the marshal, indicating service upon Chester C. Davis in Los Angeles, was accompanied by an affidavit by Mr. Davis stating that he had

been authorized in writing by Howard R. Hughes to accept such service.

Pursuant to the order of the court dated July 12th, 1962 and the suggestion made by the court at a hearing held on September 6th, 1962, the plaintiff moved before the Special Master on September 15th, 1962 for permission to suspend the taking of the depositions by the Tool Company in order to permit plaintiff to commence taking the deposition of Howard R. Hughes on September 24th, 1962, and that the suspension of the taking of depositions by the Tool Company be continued until the deposition of Howard R. Hughes was completed. The Special Master denied the application of the plaintiff.

However, in connection with this denial the Special Master directed Chester C. Davis to write to Howard R. Hughes and inform him that the Special Master considered that the subpoena is binding upon Mr. Hughes and that he is subject to appear pursuant to that subpoena on September 24th, 1962 or at any other date fixed by the court. The Special Master stated for reasons set forth in the record that unless Howard R. Hughes communicated with him by today, Friday, September 21st, 1962 he would consider that Mr. Hughes has acquiesced in this interpretation and that if Mr. Hughes subsequently either attacked the validity of the subpoena or failed to appear pursuant to that subpoena on September 24th, 1962, or at any future time that the court might direct for the taking of the deposition of Mr. Hughes pursuant to that subpoena, he, the Special Master, would consider the imposition of sanctions upon the Tool Company, and that he would entertain a motion to strike the answer of the Tool Company and enter judgment against it.

Without passing upon the power of the Special Master

to grant the entry of such judgment, the court adopts the interpretation and conditions expressed by the Special Master. Any determination by the Special Master on an application for a default judgment would, of course, be reviewable upon appeal to the court.

On the hearing of this appeal the court inquired of Chester C. Davis as to whether he had followed the directions of the Special Master. Mr. Davis advised the court that he had written to Howard R. Hughes on Monday, September 17, 1962, and enclosed the pages of the transcript of the hearing before the Special Master on September 15th, 1962 which contained the views of the Special Master. Howard R. Hughes has neither communicated with the Special Master nor the court as of 5:30 p.m. today, which is the end of the business day. Therefore, I find that Mr. Hughes has acquiesced in the interpretation and conditions expressed by the Special Master.

The Special Master has presided over the deposition proceedings practically since their inception. The propriety of plaintiff's application is peculiarly within his competence. He is aware of the court's views contained in the last paragraph of the order of July 12, 1962. Plaintiff has not made an adequate showing at ths time that the ruling of the Special Master within this framework is in error. I approve and affirm the ruling of the Special Master denying the application of the plaintiff to proceed with the deposition of Howard R. Hughes on September 24th, 1962 to the extent that the return date of September 24th, 1962 contained in the subpoena served upon Howard R. Hughes is adjourned by order of this court to October 29th, 1962 at the same time and place. The Tool Company may apply to the Special Master on October 22nd, 1962 for a further adjournment of the date now fixed for the deposition of Howard R. Hughes.

Pretrial Order, September 21, 1962

Chester C. Davis is directed to notify Howard R. Hughes of this determination before 9 p.m. tonight, Eastern Daylight Time, both by telephone communication and by mailing a copy of this order air mail special delivery to Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
September 21, 1962

/s/ Charles M. Metzner
U. S. D. J.

Pretrial Order, January 10, 1963

[Doc. 144]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held on January 9th, 1963 to consider various matters brought to the court's attention by notices of appeals from rulings of the Special Master. These matters are disposed of as follows:

1. The appeal by TWA, pursuant to a telephone request, to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, 1963 is withdrawn by counsel for TWA pursuant to an application filed January 8th, 1963.

2. The appeal by Hughes Tool Company dated January 3rd, 1963 seeking to review an order of the Special Master dated December 28th, 1962 denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. by Wadsworth is denied and the ruling of the Special Master is affirmed. The court adopts the statement of the Special Master appearing on page 11 of the transcript of

proceedings before the Special Master dated December 28th, 1962, which states:

> "I do not think it [the depositions of Sessel and Wadsworth] would advance the proper administration of this case since it would in my judgment inevitably branch out into the issues of the counterclaims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

The court has previously indicated that priority of deposition is not sacrosanct, and even without the adoption as of July 1st, 1962 of rule 4 of the Civil Rules of this district the court has the power to alternate the taking of depositions by the parties.

During a ten-month period the defendant has conducted over 80 days of depositions of the plaintiff, which have consumed over 10,000 pages of testimony. It will have substantially completed the deposition of the plaintiff this month with the testimony of Cocke and Leslie. It has then scheduled the depositions of other witnesses, including Sessel and Wadsworth, which can consume a very long period of time. The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances. The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the

plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962.

The court concurs in the ruling of the Special Master contained in his order of December 28th, 1962 clarifying his order of October 25th, 1962, directing that Howard R. Hughes appear on February 11th, 1963 for deposition in Los Angeles. The return date of the subpoena served on September 6th, 1962 as adjourned by order of this court dated September 21st, 1962 and the notice to take deposition are adjourned to February 11th, 1963 at the same time and place. The provisions of the order of this court dated September 21st, 1962 are reaffirmed and reiterated, and Mr. Davis is directed to notify Howard R. Hughes of the directions of the court contained in this order by telephonic communication and by written communication to be made and sent by 5 p.m. on January 11th, 1963.

3. The motion by Hughes Tool Company, pursuant to rule 16 of the Federal Rules of Civil Procedure, to authorize the Special Master to conduct pretrial conferences, with recommendations to the court for the form and terms of a pretrial order defining and limiting the legal and factual issues in this case, is denied without prejudice to a renewal

30 days after the completion of the deposition of Howard R. Hughes.

4. The appeal by Hughes Tool Company dated September 19th, 1962 from an order of the Special Master made on September 15th, 1962 which requires Hughes Tool Company to produce for inspection and copying by opposing counsel, prior to a further definition of the issues, the documents with respect to which Hughes Tool Company claims attorney-client privilege is denied and the order of the Special Master is affirmed.

A reading of the briefs and the oral argument would indicate that the application under advisement is in fact a reargument of the order of this court dated July 24th, 1962. At that time the court indicated that it had reviewed the opinion of the Special Master which appeared in the transcript at pages 4361-4391 and the letters of the Special Master dated May 2nd, 1962 and May 3rd, 1962. The court concurred with the opinion of the Special Master and directed that if there were any specific documents concerning which Hughes Tool Company desired specific rulings they should be submitted to the Special Master.

At pages 122 et seq. of the transcript of September 15th, counsel for the Hughes Tool Company stated that he had made available to the Special Master the documents concerning which the defendant was asserting the attorney-client privilege. Counsel went on to state that the documents were made available for a ruling by the Special Master not as to whether they would be normally covered by the attorney-client privilege, but "whether or not the attorney-client privilege had been waived." He then went on to say at page 124 that:

> "What is developing is simply the question of the procedure to be followed in obtaining rulings of the

> Special Master with respect to individual documents, applying the principles of law announced by the Special Master and affirmed by Judge Metzner, and the only area which I am aware constitutes a difference of opinion, perhaps, is whether those documents are to be produced at this time on the ground that prior to this time there had been a waiver of the privilege."

Documents heretofore submitted to the Special Master shall be made available to all parties by noon on January 14th, 1963. If there are any additional documents to which the defendent Hughes Tool Company asserts a non-waived attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14th, 1963 and a list thereof furnished at the same time to counsel for all parties.

5. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11th, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

6. The appeal by TWA dated December 20th, 1962 from an order of the Special Master appearing in the transcript of the proceedings before the Special Master on December 3rd, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection

specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
January 10, 1963

/s/ Charles M. Metzner
U. S. D. J.

Pretrial Order, January 19, 1963

[Doc. 146]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Defendant Hughes Tool Company (referred to as Toolco) has moved for an order pursuant to rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories or, in the alternative, that if such relief pursuant to rule 30(b) is denied that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to rules 12(b) and 56(b) be brought on for hearing and determination. The motion further requests that the order of this court dated January 10th, 1963 be stayed until the determination of the motions to dismiss or for summary judgment.

This case was assigned to me for all purposes by the Chief Judge on August 31, 1961 pursuant to rule 2 of the General Rules of this court. After the disposition of several preliminary matters concerning production of documents and scheduling, Toolco commenced taking depositions of the plaintiff in February 1962. The parties requested that a Special Master be appointed to supervise the deposition proceedings and the court designated J. Lee Rankin for this purpose. Since that time over 80 sessions

have been held and over 10,000 pages of testimony have been taken.

Sometime prior to July 12th, 1962 the Special Master indicated his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceeding if and when his deposition was reached. Without detailing the subsequent events, all of which are set forth in the order of this court dated September 21, 1962, the problem seemed to have been resolved when counsel for Toolco filed with the court a document purportedly signed by Howard R. Hughes authorizing said counsel to accept service of a witness subpoena on behalf of Howard R. Hughes. Plaintiff attacked the authenticity of this authorization. Counsel for Toolco flew to Los Angeles and accepted service of a witness subpoena from a Deputy United States Marshal for the Southern District of California at 7 a.m. (10 a.m. New York time) on September 6th, 1962, the morning of the hearing before this court on plaintiff's claim of forgery. The disposition of that matter has been held in abeyance. The subpoena provided for the appearance of Howard R. Hughes at the United States District Courthouse in Los Angeles on September 24th, 1962.

Subsequently, plaintiff moved before the Special Master to suspend the taking of depositions by Toolco in order to permit plaintiff to commence taking the deposition of Hughes pursuant to the subpoena. The Special Master denied this application and this court affirmed that ruling by its decision and order of September 21st to the extent that the deposition was adjourned to October 29th, 1962. Leave was given Toolco to make application to the Special Master for a further adjournment if in its opinion this was necessary. Such application was made on October 22nd, 1962 and the Special Master adjourned the return

date of the subpoena to February 11th, 1963. The court has affirmed that ruling. During the months of September, October, November and December, Toolco has proceeded with its deposition of the plaintiff.

On December 28th, 1962 defendant Toolco made application to the Special Master to take the deposition of two additional witnesses which if granted would have necessitated a further adjournment of the Hughes deposition. The Special Master denied this application and the ruling of the Special Master was affirmed by the court in its decision and order of January 10th, 1963.

Counsel for Toolco has repeatedly indicated since the assignment of this case to me that motions theretofore made to dismiss the complaint and for summary judgment would be noticed for argument, but agreed that they were premature.[1]

The present motion appears to be another attempt to put off the deposition of Hughes. As I stated in my order of January 10th,

> "The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.
>
> "Furthermore, the completion of such deposition will advance materially the date when the court could

[1] Transcript of pretrial conference September 6, 1961, pp. 25-28, 40-41.

Transcript of pretrial conference October 2, 1961, pp. 10, 23.

Transcript of pretrial conference February 23, 1962, pp. 58-59.

Transcript of pretrial conference September 19, 1962, p. 39.

Transcript of pretrial conference January 9, 1963, p. 17.

> meaningfully entertain the various motions which Mr. Davis has indicated he would like to press, for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962."

Because of the issues involved in this litigation and the nature of the proof sought from Hughes, the use of written interrogatories would be a wholly unsatisfactory procedure. Contemplated answers to specific interrogatories may not be forthcoming, which would render meaningless subsequent questions. Answers given might suggest further questions to sufficiently probe for the facts, but such questions would not appear in the interrogatories. None of the grounds asserted or implied are sufficient in this case to justify proceeding initially by written interrogatories. Consequently, the first branch of the motion, seeking relief pursuant to rule 30(b), is denied.

As I have indicated above in the quotation from the January 10th order, it would appear to the court that the case is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment. The motion papers filed before the assignment of the case pursuant to rule 2, which I assume are the motions Toolco is now bringing on for hearing, were predicated upon the grounds that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the subject matter of the action, and that there is no genuine issue as to any material fact. More specifically, it is stated that the transactions complained of were subject to and approved by orders of the CAB under section

408 of the Federal Aviation Act of 1958 and therefore pursuant to section 414 of that act there is an exemption from the operations of the antitrust laws, that if there is any question as to the scope or the enforcement of the above orders, they are matters within the exclusive jurisdiction of the CAB, and finally that the activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and willful interference with TWA's business were taken on advice of counsel.

The court, of course, cannot prevent defendant Toolco from pressing these motions at this time. However, since counsel for the defendant has been contemplating the motions for more than a year and a half, he obviously does not need the six weeks which he requests for the preparation of his papers. Counsel for plaintiff has indicated that he will cooperate in relieving defendant of a schedule with regard to motions pending in a companion action in Delaware, so as to free counsel for the defendant to devote his efforts entirely to these motions. As I indicated to counsel in an informal conference on January 16th, I will fix the date of February 1st, 1963 at noon for defendant to file all additional papers in support of its motions, and plaintiff shall be given until noon of February 8th, 1963 for answer. If upon reading defendant's papers the court is of the opinion that there is doubt as to its preliminary observations that these motions are premature, it will advise counsel of a short adjournment of the deposition of Hughes. In the meantime, this deposition shall go forward as ordered, on February 11th, 1963.

The order of January 10th will not be stayed pending a determination of the motions to dismiss and for summary judgment. The documents which the court has directed be turned over to the plaintiff shall be furnished as provided

in the order of January 10th, 1963 except that the date of January 14th, 1963 as fixed in paragraph 4 of that order is amended to read "January 22nd, 1963".

At the hearing before the Special Master on January 17th, counsel for defendant was reluctant to indicate whether he desired to hold the deposition at some place other than the United States Courthouse in Los Angeles. As counsel for the plaintiff and the additional defendants have indicated, they are amenable to cooperate in any reasonable request of counsel for the defendant, but it is necessary that advice of a change be given so that necessary arrangements can be made. Consequently, unless counsel for the defendant indicates by noon on January 22nd, 1963 a desire to change the designated place, the deposition shall proceed in the United States Courthouse in Los Angeles.

So ORDERED.

Dated: New York, New York
January 19, 1963

/s/ CHARLES M. METZNER
U. S. D. J.

Pretrial Order, February 1, 1963

[Doc. 168]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

A pretrial conference was held in the above action on January 28th, 1963 at 5 p.m.

Four matters were presented to the court for consideration:

1. A motion by the defendant Hughes Tool Company, returnable February 8th, 1963 at 4 o'clock, to adjourn the deposition of Howard R. Hughes presently scheduled for February 11th, 1963 until after a final adjudication of said defendants' motion to dismiss the complaint. This motion was advanced for argument to January 28th, and on the record of the pretrial conference, the attorney for Hughes Tool Company withdrew the motion.

2. A motion by the plaintiff Trans World Airlines to withdraw its motion to dismiss the counterclaims, except that portion of said motion which attacks the second counterclaim for failure to state a claim and the motion for summary judgment with respect to the sixth counterclaim. This motion is granted and plaintiff is directed to file its reply to the counterclaims of defendant Hughes Tool Com-

pany within ten days after the conclusion of the deposition of Howard R. Hughes.

3. A motion by the additional defendant Charles C. Tillinghast, Jr. for leave to answer the counterclaims of the defendant Hughes Tool Company ten days after the conclusion of the deposition of Howard R. Hughes. This motion is granted.

4. A motion by the defendant Hughes Tool Company to review an order of the Special Master dated January 22nd, 1963 requiring the defendant Hughes Tool Company to produce for inspection and copying the so-called tax documents. As to the nine boxes of papers which the court is informed may contain pertinent documents in relation to the request to produce, the defendant Hughes Tool Company is directed to send them today to counsel for the plaintiff, who shall make arrangements for producing copies thereof for the plaintiff and the additional defendants. If the defendant Hughes Tool Company contends for some reason or other that said documents are not subject to production, then the nine boxes shall be sent today to the Special Master, who shall rule upon any objections that the defendant shall make to the production of specific documents. Any other documents subject to the notice and affidavit of January 9, 1963 shall be produced on a daily basis on or before February 11th, 1963.

So Ordered.

Dated: New York, N. Y.
February 1st, 1963

/s/ Charles M. Metzner
U.S.D.J.

Opinion and Order, January 4, 1966

[Doc. 496]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

against

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

METZNER, D. J.

Defendant has moved for a pre-hearing order calling upon the plaintiff to set forth the facts supported by the record or by matters judicially noticeable or by evidence which the plaintiff is prepared to offer, upon which plaintiff would rely to preclude the entry of the following finding of fact:

> The facts before this Court establish that at no time during the period covered by the complaint herein were the defendants, or any of them, engaged in the manufacture or supply of commercial transport aircraft in competition with any manufacturer or supplier of such aircraft.

The defendant then requests that if this proposed finding of fact is supported notwithstanding the material set forth in the plaintiff's offer of proof, the finding of fact shall be made and the case dismissed as a matter of law.

A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion.

After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed.

MOTION DENIED. SO ORDERED.

Dated: New York, N. Y.
January 4, 1966

/s/ CHARLES M. METZNER
U. S. D. J.